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SC Court of Appeals

IN 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.

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

of which Progressive Direct Insurance Company is the Appellant.

INITIAL REPLY BRIEF OF APPELLANT
PROGRESSIVE DIRECT INSURANCE COMPANY

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SUMMARY

This is an appeal from discovery orders holding (1) that an insurance company did not really anticipate litigation after being told in writing by an opposing lawyer that he intended to file lawsuits against both the insurance company and its insured, and (2) that information pertaining solely to insurance coverage and the insurance carrier's loss reserves is subject to discovery in a motor vehicle collision case.

The Circuit Court issued two discovery orders compelling non-party Progressive Direct Insurance Company ("Progressive Direct") to produce protected, proprietary, and irrelevant materials from its insurance claim file. After Progressive Direct declined to produce the materials, the Circuit Court issued an order holding Progressive Direct in contempt of court. The discovery orders should be reversed because they incorrectly interpret and apply Rule 26 of the *South Carolina Rules of Civil Procedure* and because they are premised on unsupported and irrelevant facts. The contempt order should be reversed because it is predicated solely on underlying discovery orders that are blatantly contrary to South Carolina law.

The disputed materials are two categories of insurance claim log notes that Progressive Direct redacted in responding to Respondent's subpoena *duces tecum*. Progressive Direct did not withhold any requested documents from production; this dispute is only about notes from the insurance carrier's claim log. The first category consists of notes created after Progressive Direct received Respondent's Litigation Demand Letter[1] threatening to sue Progressive Direct and its insured. The Litigation Demand Letter told Progressive Direct to anticipate litigation. As such,

[1] Throughout this Reply, Progressive Direct used the same capitalized terms that it used in its principal brief.

notes created thereafter were created in anticipation of litigation and are protected as work product pursuant to Rule 26(b)(3), SCRCP.

The second category consists of notes detailing Progressive Direct's coverage investigation and setting loss reserves for the insurance claim. The subpoena to Progressive Direct did not even request these notes, and they have absolutely no bearing on liability, damages, or any other issues or claims asserted in this motor vehicle collision case, but the Circuit Court ordered them to be produced anyway. This is not an insurance coverage or bad faith lawsuit. Therefore, claim log notes about coverage and loss reserves are not "relevant to the subject matter of the pending action" and fall outside the scope of permissible discovery fixed by Rule 26(b)(1), SCRCP.

For the reasons discussed herein and in Progressive Direct's principal brief, the Circuit Court erred by ordering Progressive Direct to produce materials prepared in anticipation of litigation and which are irrelevant to the subject matter of this lawsuit. It also erred by holding Progressive Direct in contempt of court for not complying with erroneous discovery orders. Progressive Direct respectfully requests that the Court reverse the discovery orders and the contempt order.

ARGUMENT

I. Respondent asks the Court to ignore that its Litigation Demand Letter specifically and intentionally told Progressive Direct that Respondent intended to file lawsuits against Progressive Direct and its insured, and it would have been unreasonable for Progressive Direct not to anticipate litigation at that point.

When a lawyer representing an opposing claimant sends a letter telling a liability insurer that it should anticipate litigation to be forthcoming, it is reasonable for that insurer to anticipate litigation, and the insurer's internal log notes created in anticipation of litigation thereafter are protected from disclosure under Rule 26(b)(3). In fact, it would be <u>unreasonable</u> for the insurer <u>not</u> to anticipate litigation and begin managing the claim accordingly at that point. However, Respondent asks this Court to accept the untenable proposition that Progressive Direct did not anticipate litigation after Respondent's lawyer told it to anticipate litigation and then filed this lawsuit on the exact day he said he would.

Respondent offers three arguments why he claims this Court should affirm the finding that Progressive Direct did not anticipate litigation, all of which require this Court – like the Circuit Court – to utterly disregard Respondent's Litigation Demand Letter. The Court should decline that invitation.

First, Respondent argues that February 18, 2025 – the date Progressive Direct received the Litigation Demand Letter – is nothing more than an "arbitrary" cutoff date that Progressive Direct selected at random. But this argument ignores the fact that the Litigation Demand Letter specifically and credibly threatened to sue Progressive Direct and its insured, with the ability to follow through on this threat. The date that Progressive Direct received the Litigation Demand Letter and began managing the claim in preparation for litigation is not "arbitrary;" it is the best evidence of when Respondent's counsel placed Progressive Direct on notice that litigation was forthcoming and Progressive Direct began anticipating litigation in this case.

Second, Respondent argues that his own lawyer's Litigation Demand Letter should not be taken seriously because, now that this case is before the Court of Appeals, the lawyer's language specifically threatening litigation against Progressive Direct and its insured did not mean what it said. Rather, Respondent claims the lawyer's written threat of litigation was meaningless "boilerplate that appears in virtually every third-party automobile policy-limits demand in South Carolina." (Respondent's Brief at 14-15.) This is a glaring attempt to move the goalposts, and the Court should reject it. One cannot argue that a letter sent for the specific purpose of causing the recipient to anticipate litigation only means what it says when that result is beneficial to the sender.

The Litigation Demand Letter meant what it said, and it said that Respondent would promptly file a lawsuit against Progressive Direct and its insured. Therefore, Progressive Direct had no choice but to anticipate that Respondent would commence litigation with it received the Litigation Demand Letter from Respondent's counsel saying they would do so.

Third, Respondent argues that because Progressive Direct: (1) apparently did not hire counsel quickly enough and (2) continued to communicate with Respondent's counsel while knowing that litigation was forthcoming if the claim did not get resolved, it must not have really anticipated litigation when it received the Litigation Demand Letter. However, these characterizations cannot logically fit with the facts of this claim, and they are not even relevant to the analysis. Regardless, they certainly do not erase the effect of Respondent's Litigation Demand Letter. Respondent concedes that Rule 26(b)(3) applies without respect to the involvement of a lawyer. Therefore, Progressive Direct's decision not to retain counsel immediately when it received the Litigation Demand Letter is hardly probative of whether it anticipated litigation. Likewise, parties and insurance companies communicate with one another throughout the life of a case. It is indisputable that Respondent placed Progressive Direct on notice and that Progressive Direct anticipated litigation was forthcoming while it continued trying to resolve the claim. Progressive Direct did not surrender the right to assert work product protection by negotiating on behalf of its insured.

Respondent's arguments are unavailing, and the Court should reject them. At bottom, two facts remain unavoidable: (1) the Litigation Demand Letter is the most significant evidence of whether and when Progressive Direct anticipated litigation in this case; and (2) the Litigation Demand Letter demonstrates, by its own terms, that Progressive Direct anticipated litigation on February 18, 2025. Materials created once Progressive Direct anticipated litigation are work product protected from disclosure. The Circuit Court omitted these facts from its analysis, instead adopting a sweeping rule that an insurance company cannot anticipate litigation until it hires an attorney and stops communicating with a claimant's lawyer. This ruling is inconsistent with the plain text of Rule 26(b)(3) and finds no support in the record. As such, it must be reversed.

A. Application of work product protection is a fact-specific analysis, and in this case, the analysis necessarily depends on what the Litigation Demand Letter says.

Respondent accuses Progressive Direct of asserting an arbitrary "blanket-demand letter cutoff" date, which Respondent claims does not constitute specific evidence that Progressive Direct truly anticipated litigation in this case. (Respondent's Brief at 13). But Progressive Direct is not advocating for a "blanket-demand letter cutoff," nor does it contend that an insurance company anticipates litigation every time it receives a letter demanding payment or communicating a settlement offer. Rather, Progressive Direct's position is simply this: the specific language of Respondent's Litigation Demand Letter <u>**in this case**</u> caused Progressive Direct to anticipate that litigation was imminent – not merely because Progressive Direct received a letter, but because the Litigation Demand Letter was issued by a lawyer who specifically threatened to sue Progressive Direct and its insured.

February 18, 2025 is not "arbitrary" by virtue of being the date when all parties and Progressive Direct would have obviously begun to anticipate litigation. *See Milionis v. Jones*, No. 2020-CP-23-05155 (S.C. Com.Pl. Dec. 3, 2021) (acknowledging that at the time plaintiff's counsel submitted policy-limits demand, "all parties would clearly be anticipating litigation."). Courts routinely hold that certain events, like the receipt of a lawyer's demand letter notifying the recipient that the lawyer plans to file a lawsuit, necessarily trigger application of the work product doctrine or attorney-client privilege. *See Mizner Grand Condo. Ass'n. v. Travelers Prop. Cas. Co. of Am.*, No. 09-82280-CIV-MARRA/JOHNSON, 2011 WL 13174649 at *5 (S.D. Fla. Feb. 24, 2011) (holding materials generated after insurer's receipt of a demand letter "should be presumed work-product."). Here, it is clear that a letter from an attorney telling an insurer to anticipate litigation necessarily causes the insurer to anticipate litigation. Thus, the date the insurer received that letter is anything but arbitrary; it is direct evidence of when Progressive Direct began anticipating litigation.

Respondent's own hypothetical further underscores the importance of the Litigation Demand Letter in this case – and the severity of the Circuit Court's error in ignoring it. Respondent suggests that the mere existence of a document, such as a complaint that has not been served, does not automatically trigger work product protection because that document may never reach the recipient and, therefore, may not influence the recipient's state of mind. (Respondent's Brief at 10). However, unlike an unserved complaint, the Litigation Demand Letter did not sit "unfiled in the clerk's office." *Id.* Progressive Direct received it on February 18, 2025 and immediately assigned a litigation adjuster to the file for further handling in anticipation of litigation.

In sum, the language of Respondent's Litigation Demand Letter and the date that Progressive Direct received it not only are relevant but are essential to the analysis of whether and when Progressive Direct anticipated litigation in this case. The Circuit Court abused its discretion by failing to consider these facts in its analysis.

B. The Court should not accept Respondent's invitation to find that every *Tyger River* demand letter threatening litigation is mere "boilerplate" that does not mean what it says.

The Litigation Demand Letter unambiguously communicated Respondent's threat to file this lawsuit against Progressive Direct's insured and to file a bad faith lawsuit against Progressive Direct. Despite this fact, Respondent argues that the letter **<u>drafted by his own attorney</u>** could not have caused Progressive Direct to anticipate litigation because Respondent now claims the letter was mere "boilerplate" that "[e]very experienced adjuster processes … routinely." (Respondent's

Brief at 14-15). In other words, because attorneys regularly send *Tyger River* demand letters to insurance companies, Progressive Direct should have known that Respondent's counsel did not *really* mean what he wrote.

The irony implicit in this argument is palpable. Respondent sent the Litigation Demand Letter **so that** Progressive Direct would anticipate litigation and promptly issue payment to avoid that litigation. However, because Progressive Direct did not issue payment, Respondent now claims the Litigation Demand Letter did not mean what it said. Respondent cannot have it both ways.

Respondent's argument asks too much of Progressive Direct and this Court. Regardless of Respondent's changing, subjective intentions in sending the letter, those intentions do not dictate the reasonableness of Progressive Direct's reaction to it. Progressive Direct is not a mind reader. It cannot be charged with extracting Respondent's motives from otherwise plain language threatening litigation, and the Court should not find that Progressive Direct's actions taken in anticipation of litigation are only protected work product if Respondent later acknowledges that the Litigation Demand Letter meant what it said. Respondent and/or his lawyer chose to send the Litigation Demand Letter and what to say to Progressive Direct in the letter. Moreover, Respondent's filing of this lawsuit on the exact day identified in the Litigation Demand Letter demonstrates that he meant exactly what he wrote.

The Litigation Demand Letter threatening litigation caused Progressive Direct to anticipate litigation – just as it was intended to do. The Court should reject Respondent's attempt to distort the plain meaning of his own attorney's letter.

C. The plain language and stated purpose of the Litigation Demand Letter caused Progressive Direct to anticipate litigation, and its anticipation was objectively reasonable under the circumstances.

The Litigation Demand Letter stated that Respondent would file this lawsuit against Progressive Direct's insured, would attempt to obtain a judgment award, and would then file a bad faith lawsuit against Progressive Direct. **The only** reasonable reaction to this language is to anticipate litigation. Respondent now attempts to shift the impetus of his letter, describing it as a "conditional offer of settlement – not a threat of suit." (Respondent's Brief at 15.) But the Litigation Demand Letter speaks for itself.

Respondent used the well-known phrase "*Tyger River*" in the title and throughout the body of the Litigation Demand Letter. (Litigation Demand Letter, pp. 1, 5-6). While Respondent now claims his *Tyger River* references were benign and mere "boilerplate," the essential purpose of a *Tyger River* demand letter is to carry serious implications for an insurer and its insured. Of course, the *Tyger River* doctrine creates a cause of action against an insurer that unreasonably refuses to settle a claim. There is simply no legitimate reason, other than to prompt the recipient to fear a bad faith lawsuit and immediately tender payment, for Respondent to highlight the *Tyger River Doctrine* in a demand letter to an insurer.

Additionally, the Litigation Demand Letter was replete with references to lawsuits and judgments. It spent pages discussing the likelihood of a punitive damages award against Progressive Direct's insured – which is obtainable only through litigation. (*Id.* at pp. 2-4). It specifically advised that Progressive Direct could protect its insured's personal assets from a judgment if it paid the demand. (*Id.* at p. 5). Moreover, it stated that it was sent "for purposes of establishing the absence of good faith in any subsequent proceedings." (*Id.* at p. 6). While it is true that the letter included a settlement demand, it also specifically and intentionally threatened litigation in order to intimidate Progressive Direct into meeting that settlement demand.

Respondent does not deny this – nor could he. The threat of litigation is clear on the face of the document. The Court should reject Respondent's attempt to dilute the meaning of a letter his attorney drafted.

Respondent also argues that Progressive Direct could not have anticipated litigation upon receipt of the Litigation Demand Letter because litigation was contingent on non-payment. (Respondent's Brief at 15-16). In other words, Progressive Direct chose "the path leading to litigation" and, therefore, cannot blame the Litigation Demand Letter. (*Id.* at 16). However, this argument actually supports Progressive Direct's position because it shows that Progressive Direct did, in fact, anticipate that litigation was forthcoming. The issue is not whether Respondent agrees with Progressive Direct's decisions in evaluating the demand and deciding whether to accept it as a way of avoiding litigation; the issue is that Progressive Direct's materials created in anticipation of litigation are protected work product. This argument also asks the Court to read the Litigation Demand Letter in a vacuum. The Litigation Demand Letter demanded that Progressive Direct pay money and threatened Progressive Direct with a prompt lawsuit if it did not comply. The Litigation Demand Letter was sent for the express purpose of making Progressive Direct anticipate litigation, and Progressive Direct anticipated litigation upon receiving it.

D. Trial court decisions advancing the same erroneous legal conclusions relied upon by the Circuit Court are not binding on this Court and are contrary to the greater weight of authority on the issue.

Respondent notes, and Progressive Direct agrees, that there are no South Carolina appellate decisions specifically addressing the issue presently before this Court: whether an insurance company reasonably anticipates litigation after receiving a claimant's *Tyger River* demand letter specifically threatening litigation. (Respondent's Brief at 9). Despite the absence of appellate authority on the issue, Respondent has consistently accused Progressive Direct of taking positions which are contrary to South Carolina law. (Respondent's Mem. in Supp., p. 4). All the while, Respondent continues to cherry-pick non-binding trial court orders that misapprehend the text and spirit of Rule 26(b)(3).

Unsurprisingly, Respondent's brief fails to mention the host of South Carolina trial court orders expressly holding that an insurance company anticipates litigation upon receipt of a claimant's *Tyger River* demand letter. *See, e.g., Pope v. Hansmeyer*, No. 2025-CP-22-00289 (S.C. Com.Pl. Nov. 4, 2025) (holding materials prepared after UIM carrier received time-limited settlement demand "were created in reasonable anticipation of litigation and protected from production under Rule 26(b)(3)."); *Moran v. Gummelt*, No. 2024-CP-26-04191 (S.C. Com.Pl. Sept. 12, 2021) (holding insurer's post-demand log notes reflecting adjusters' and counsels' impressions, evaluations, and strategies were protected from disclosure under Rule 26(b)(3)); *Keller v. Lollis*, No. 2019-CP-23-06266 (S.C. Com.Pl. Apr. 1, 2022) (holding that liability insurer's claim file "was prepared in anticipation of litigation."); *Singleton v. Robertson*, No. 2020-CP-40-05309 (S.C. Com.Pl. June 18, 2021) ("The plaintiff maintains that documents are not prepared in anticipation of litigation until the defense counsel is retained or the lawsuit is filed. While the court is aware that other learned trial judges in this state have seemingly accepted that argument, this court disagrees."); *Milionis v. Jones*, No. 2020-CP-23-05155 (S.C. Com.Pl. Dec. 3, 2021) (holding that at the time plaintiff's counsel submitted a policy-limits demand, "all parties would clearly be anticipating litigation.").[2]

Because no South Carolina appellate courts have addressed, let alone resolved this issue, the Court can and should "look to other jurisdictions to determine if the issue has been decided and if the decision is persuasive authority." *Ellis v. Oliver*, 335 S.C. 106, 111, 515 S.E.2d 268, 271

[2] This is far from an exhaustive list. There are numerous other circuit court orders expressly adopting Progressive Direct's position.

(Ct. App. 1999). Numerous state and federal courts across the country have decided this issue and have identified the receipt of a demand letter threatening litigation as the point when the recipient reasonably anticipates litigation for purposes of work product protection. *See, e.g., Arestad v. Liberty Mut. Fire. Ins. Co.*, No. C22-175RSM, 2022 WL 17832194 at *3 (W.D. Wash. Dec. 21, 2022) ("The redactions at issue all follow that demand letter and were created ***because of the prospect of litigation***.") (emphasis added); *Lerma v. Prudential Ins. Co. of Am.*, No. EP-08-CV-010-DB, 2008 WL 11334044 at *3, n.1 (W.D. Tex. Nov. 12, 2008) ("By its nature, a demand letter would indicate to a prudent party that litigation may proceed.").[3] Tellingly, Respondent fails to cite even a single case.

Just like the demand letters at issue in the above cases, Respondent's Litigation Demand Letter told Progressive Direct to anticipate litigation. Therefore, Progressive Direct reasonably anticipated litigation upon receiving it. However, unlike the trial courts in the above cases, the Circuit Court in this case **failed to even consider the Litigation Demand Letter as part of its work product analysis**. To be sure, the Circuit Court's orders do not even mention the Litigation Demand Letter other than to accuse Progressive Direct of selecting an arbitrary cut-off date. This oversight amounts to an abuse of discretion.

This Appeal calls on the Court to provide clarity on this undecided issue. The Court should take a stance in line with the common sense approach endorsed by state and federal courts around the country.

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[3] In its principal brief, Progressive Direct cites to at least eight (8) cases uniformly holding that a demand letter threatening litigation causes the recipient to anticipate litigation. Respondent cites nothing to the contrary.

E. A liability insurance carrier does not have to hire an attorney to anticipate litigation and can negotiate with a claimant's lawyer without forfeiting the right to protect its work product created in anticipation of litigation.

Without considering the Litigation Demand Letter, the Circuit Court found that Progressive Direct did not anticipate litigation on February 18, 2025 because it: (1) did not hire an attorney immediately upon receiving the Litigation Demand Letter and (2) continued to communicate with counsel for the Respondent after receiving the Litigation Demand Letter. (Sept. 19, 2025 Order, pp. 4-7). However, these facts cannot sustain the Circuit Court's finding because they are not indicative of whether Progressive Direct anticipated litigation, especially in light of the Litigation Demand Letter establishing that it had no choice but to anticipate litigation. Therefore, the Circuit Court's findings lacked evidentiary support, which amounts to an abuse of discretion.

Rule 26(b)(3) expressly applies to insurers, regardless of whether an attorney is involved. *See, e.g., State Farm Fire and Case. Co. v. Admiral Ins. Co.*, 225 F.Supp.3d 474, 483 (D.S.C. 2016) ("By the plain text of the Rule, an insurer may claim the protection of the work product doctrine – an attorney-client relationship is unnecessary."). Therefore, the timing in which Progressive Direct retained an attorney is immaterial to the question of whether it anticipated litigation and is not a proper basis for the Circuit Court's ruling.

Progressive Direct's communications with Respondent's counsel are likewise irrelevant and cannot support the Circuit Court's findings. Respondent concedes that "negotiation and anticipation of litigation can coexist." (Respondent's Brief at 16.) The Circuit Court did not even attempt to explain why that is not what happened in this case. Instead, it summarily decided that because Progressive Direct "continued to actively engage in settlement negotiations after February 18, 2025," (Sept. 19, 2025 Order, p. 4), it did not anticipate litigation. Again, this is not sufficient evidence to conclude that Progressive Direct did not anticipate litigation, and Respondent admits as much in his brief.

F. Respondent's argument that he demonstrated substantial need is not supported by the record and ignores the fact that the Circuit Court failed to apply the correct legal standard.

The Circuit Court abused its discretion because it found that Respondent demonstrated substantial need without first deciding whether the substantial need exception could even apply. Respondent's arguments to the contrary ignore that the Circuit Court misapplied the law. *See Wicomico Nursing Home v. Padilla*, 910 F.3d 739, 750 (4th Cir. 2018) (noting that a circuit court abuses its discretion when it "misapprehends or misapplies the applicable law.")

Respondent does not dispute that the Court misapplied the law. Instead, he asks this Court to excuse that failure because Progressive Direct's privilege log gave the Circuit Court "nothing to analyze." (Respondent's Brief at 21). However, this argument is nonsensical. The Circuit Court, not Progressive Direct, is tasked with applying the correct legal standard. If the Circuit Court did not have enough evidence to render a **required** threshold factual finding, it should have requested additional information rather than issuing a ruling without having the required information to reach that ruling.

Before considering the substantial need exception, a court **must** determine whether the work product at issue constitutes fact work product or opinion work product. *See Constan Gervais Street Car Wash, Inc. v. Auto-Owners Ins. Co.*, 350 F.R.D. 264, 267 (D.S.C. 2025) ("If the material was prepared in anticipation of litigation, then the Court must determine whether the material is opinion work product or non-opinion work product."). The substantial need exception does not apply to opinion work product because it is "absolutely protected." *Lewis v. Richland Cty. Rec. Comm'n*, No. 3:16-cv-2884-MGL-TER, 2018 WL 4596119 at *4 (D.S.C. Sept. 25, 2018). The Circuit Court **did not** find that Progressive Direct's work product was fact work product. Whatever the reason, this omission constitutes is a clear error of law.

While Respondent's argument that he demonstrated substantial need is objectively incorrect, it is irrelevant because the Circuit Court erred by even considering substantial need in the first place. Moreover, the argument finds no support in the record. Respondent does not dispute that he can obtain information regarding Davidson's driving record and reported medical emergency by simply asking Davidson. Instead, he argues that "no deposition of Davidson can replicate what [Progressive Direct's] adjusters documented in the immediate aftermath of the collision . . . ." (Respondent's Brief at 22.) However, it is undisputed that the claim log notes at issue were entered after February 18, 2025 – nearly three (3) months after the November 2024 motor vehicle collision. These notes were not entered "in the immediate aftermath of the collision," and Respondent's argument contradicts itself. *See Bryant v. Trucking*, No. 4:11-cv-2254-RBH, 2012 WL 162409, at * 4 (D.S.C. Jan. 18, 2012) ("Most of the authority seems to recognize that the passage of a week or more does not qualify as sufficiently contemporaneous to justify penetrating the work product protection . . .").

II. This Appeal is properly before the Court.

For the second time in this case, Respondent incorrectly contends this Appeal is not properly before the Court because Respondent claims Progressive Direct improperly "engineered" it. (Respondent's Brief at 7-8). However, this argument mischaracterizes the procedure for appealing a discovery order and misrepresents Progressive Direct's conduct in this case. Regardless, Progressive Direct did exactly what is required under South Carolina law: (1) declined to comply with the Circuit Court's discovery orders; and (2) was held in contempt of court for that reason, resulting in directly appealable Circuit Court orders. Therefore, the Appeal is properly before the Court, and the Court may consider the merits of the discovery orders.

A. A non-party may appeal a discovery order if it refuses to comply with the order and is held in contempt of court on that basis.

In *Ex parte Whetstone*, the Supreme Court of South Carolina established that a non-party may immediately appeal an interlocutory discovery order if it: (1) refuses to comply with the order; and (2) is held in contempt of court for his failure to comply. 289 S.C. 580, 347 S.E.2d 881, 881-82 (1986). Despite Respondent's attempt to qualify this rule, nothing in *Whetstone* purports to limit this procedure to a particular set of facts or to specific conduct engaged in by the contemnor. *Whetstone* did not discuss any "specific justification" that must exist for refusing to comply and pursuing an appeal. Rather, the Supreme Court simply explained that a non-party does not suffer legal injury as a result of a discovery order until he is in contempt. *Id.* 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. Non-compliance followed by a contempt order is the appropriate course leading to an appealable order. That is exactly what occurred in this case. Therefore, the Court may consider the merits of the Circuit Court's discovery orders.

B. The Amended Order did not provide the relief Progressive Direct requested in its Motion to Alter or Amend.

Even if the *Whetstone* procedure only applied in the event of an "irreversible disclosure" – which it does not – Progressive Direct faced irreversible disclosure in this case because the Amended Order expressly reinforced the findings rendered in the Initial Order and again compelled Progressive Direct to produce its work product and pay costs.

The thrust of Respondent's argument is that Progressive Direct obtained, then refused to accept the relief it requested from the Circuit Court. While this statement is entirely irrelevant to the *Whetstone* analysis for the reasons explained above, it is also inaccurate. Under no conceivable reading of the Amended Order did the Circuit Court grant Progressive Direct the relief it requested.

The Initial Order instructed Progressive Direct to produce all claim log notes and materials created prior to April 7, 2025 – with the exception of "pure financial reserves." (Sept. 19, 2025 Order, p. 9). The Initial Order also instructed Progressive Direct to pay costs in the amount of $500.00. (*Id.* at 10.) In its Motion to Alter or Amend, Progressive Direct specifically asked the Circuit Court to do one of two things: (1) vacate the Initial Order and enter an Order ruling that Progressive Direct need not produce any more materials; or (2) conduct *in camera* review of the redacted materials and hold a rehearing after it completed its review. (Sept. 26, 2025 Mot., p. 6).

The Amended Order did neither of those things. Instead, based on the same flawed conclusions and findings of the Initial Order, it again ordered Progressive Direct to produce "the entire claims handling file up until April 7, 2025, as stated in the Court's prior Order." (Oct. 8, 2025 Order, p. 9). Further, it affirmed the Initial Order's imposition of costs, holding that Progressive Direct's arguments were not substantially justified. (*Id.*) It is inexplicable to suggest that an order: (1) describing Progressive Direct's arguments as "inconsistent . . . with South Carolina discovery law as a whole;" (2) ordering Progressive Direct to produce its claim file; (3) ordering Progressive to remit costs; and (4) declining to grant any of the relief Progressive Direct requested in its Motion to Alter or Amend gave Progressive Direct what it wanted. It did not.

Respondent claims that the Amended Order's invitation to re-send a privilege log to Respondent's counsel and to the Circuit Court somehow equates to the *in camera* review Progressive Direct requested. (Respondent's Brief at 6-8, 19). However, nothing in the Amended Order suggests that the Court intended to conduct *in camera* review. Progressive Direct was never asked to submit any documents to the Circuit Court. Instead, the Circuit Court ordered Progressive Direct to produce its claim file in accordance with the Initial Order and to produce a privilege log – which Progressive Direct had already sent and which the Circuit Court had presumably just reviewed in considering the Motion to Alter or Amend. (Oct. 8, 2025 Order, pp. 9-10). That is not the same as *in camera* review, and the Court did not grant Progressive Direct the relief it sought.

C. Under well-established South Carolina law, complying with the Circuit Court's Orders would have waived Progressive Direct's right to appeal.

Furthermore, Progressive Direct had no choice but to refuse compliance with the Circuit Court's Orders if it wanted to preserve its right to file this Appeal. The Supreme Court of South Carolina, and this Court, have emphasized that **<u>any act</u>** complicit with a discovery order may jeopardize the right to appeal. *See Whetstone*, 289 S.C. at 580, 347 S.E.2d at 881 ("Instead 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 . . . ."); *see also Jones v. Robinson*, Op. No. 2023-UP-369, 2023 WL 7685902 at *5-6 (Ct. App. Nov. 15, 2023) (unpublished) (holding discovery orders were not preserved for appeal where party elected to "accept the court's formulation of discovery").

As a contrasting example, in *Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014), the Supreme Court of South Carolina demonstrated an example of procedure that does not comply with the *Whetstone* procedure, and it did not resemble what happened in this case at all. In *Davis*, the Supreme Court held the appellants did not follow the *Whetstone* procedure when they "continued along in the litigation, attempting to divert the implementation of the court's rulings by providing incomplete responses and causing delay . . . while they decided whether or not to surrender to the possibility of being held in contempt of court." *Id.* Consequently, the discovery orders underlying the eventual contempt order were the law of the case and not appealable. *Id.*

Here, Respondent has it backwards. Progressive Direct tracked the *Whetstone* procedure exactly by **<u>fully declining compliance</u>** with the Circuit Court's orders. As such, pursuant to

Whetstone and its progeny, the Circuit Court's discovery orders are appealable and properly before this Court.

III. The Circuit Court did not correctly tailor its order compelling Progressive Direct to produce claim log notes concerning insurance coverage and loss reserves because the notes are outside the scope of discovery.

Respondent argues that the Circuit Court's Orders were "correctly tailored" because they permitted Progressive Direct to withhold "pure financial reserves." (Respondent's Brief at 18.) However, no amount of "tailoring" could cure an order compelling an insurance company to produce information relating to its coverage investigation and loss reserves in a motor vehicle collision case. Such information is unquestionably outside the scope of the discovery under Rule 26(b)(1), and the Circuit Court abused its discretion in ordering Progressive Direct to produce **<u>any</u>** of it.

Parties may only obtain discovery on matter which is "relevant to the subject matter of the pending action." Rule 26(b)(1), SCRCP. The Circuit Court had no evidentiary basis to conclude that Progressive Direct's coverage investigation and loss reserves relate to the claims and defenses at issue in this case. In fact, the Circuit Court did not even purport to render such a finding. Instead, it found that "[c]overage determinations and reserve information are relevant to understanding Progressive's investigation and evaluation of the of this claim." (Sept. 19, 2025 Order, p. 3). It also found that coverage and reserve notes may reveal information about "[t]he basis for Progressive's initial evaluation and subsequent change in position." (*Id.*). However, this lawsuit does not involve Progressive Direct's evaluation of an insurance claim. Consequently, the speculative assertion that the notes might shed light on Progressive Direct's evaluation of the claim, which is not the subject matter of this lawsuit, is not a proper basis for ordering Progressive Direct to produce them.

Additionally, the Circuit Court noted – with no explanation – that coverage and reserve notes could reveal information "relevant to the underlying collision." (*Id.*). Not only is this statement unsubstantiated, but it is simply not true. Facts germane to an automobile liability insurer's coverage investigation – like whether the person claiming coverage qualifies as an insured under the insurance policy – have no bearing on the insured's conduct, the claimant's damages, or any other issue that could possibly arise in this case. Accordingly, this is also not a proper basis for ordering Progressive Direct to produce coverage and reserve notes.

Lastly, the Circuit Court's purported "tailoring" made no practical difference to the conclusion in the Order. There is no meaningful distinction between "reserve notes" – which the Circuit Court ordered Progressive Direct to produce – and "pure financial reserves" – which the Circuit Court permitted Progressive Direct to withhold. The terms are synonymous. To the extent Respondent argues that this so-called "tailoring" somehow rectifies the Circuit Court's erroneous findings, this is incorrect, and the Court should find that the Circuit Court's order was in error.

IV. Progressive Direct did not waive its right to challenge the Circuit Court's unsubstantiated ruling on the application of the work product doctrine.

Respondent contends that Progressive Direct waived any argument that the Circuit Court failed to conduct *in camera* review because Progressive Direct did not request *in camera* prior to the Circuit Court's issuance of the Initial Order. (Respondent's Brief at 19-21). However, this argument fails for several reasons.

A. Respondent mischaracterizes the Supreme Court's holding in *Stokes-Craven*.

The Supreme Court of South Carolina has held that a trial court **must** conduct *in camera* review if it has no independent evidentiary support for ruling on the application of the work product doctrine. While Respondent claims that trial courts have no "sua sponte obligation to conduct *in camera* review," (Respondent's Brief at 20), the case he cites for this proposition establishes exactly the opposite. In *Stokes-Craven Holding Corp. v. Robinson*, a plaintiff filed a legal malpractice suit against its former attorney. 416 S.C. 517, 787 S.E.2d 485 (2016). The plaintiff filed a motion to compel seeking correspondence between the attorney and his legal malpractice insurer – which the attorney had withheld as work product on grounds that the correspondence was prepared in anticipation of litigation. *Id.*

The trial court denied the motion, holding that the correspondence was protected work product. *Id.* However, the trial court failed to review the correspondence *in camera* prior to issuing its ruling. On appeal, the Supreme Court reversed, holding that "the circuit court abused its discretion in ruling on [the plaintiff's] motion to compel . . . because there was no evidentiary basis to support its factual conclusions." *Id.* at 537, 787 S.E.2d at 495. Specifically, the trial court "failed to conduct an in camera hearing to review the requested information . . . ." *Id.*

Critically, the trial court order at issue in *Stokes-Craven* made clear that **no party requested *in camera* review** of the withheld correspondence in connection with the motion to compel. *Stokes-Craven Holding Corp. v. Robinson*, No. 2010-CP-14457, 2013 WL 12380805 at *4 (S.C. Com.Pl. June 6, 2013), *rev'd*, 416 S.C. 517, 787 S.E.2d 485. In fact, the trial court stated it had not even received a privilege log and found one to be unnecessary. *Id.* Despite the fact that no party requested *in camera* review, the Supreme Court reversed and found that the trial court should have undertaken *in camera* review on its own accord because it lacked any other factual support for its ruling.

Pursuant to *Stokes-Craven*, the Circuit Court in this case had an independent obligation to conduct *in camera* review because it had no factual bases to rule in favor of Respondent. It failed to do so – despite Progressive Direct's request. As a result, the Circuit Court abused its discretion.

B. The Circuit Court had an independent evidentiary basis to conclude that Progressive Direct <u>did</u> anticipate litigation, not the other way around.

Respondent also argues that *in camera* review was unnecessary in this case because the Circuit Court had independent evidentiary bases to rule on the work product protection without reference to the contents of the claim log notes. However, this is incorrect. While the content of the Litigation Demand Letter is conclusive evidence that Progressive Direct was on notice of Respondent's intent to file lawsuits against both Progressive Direct and its insured, the facts do not support a **<u>presumption</u>** that Progressive Direct did not anticipate litigation. As explained herein, the Circuit Court apparently based its decision solely on the facts that Progressive Direct did not immediately retain an attorney and continued communicating with counsel for Respondent after being placed on notice that Respondent intended to file lawsuits. However, these facts are not relevant to whether Progressive Direct anticipated litigation, especially in light of the Litigation Demand Letter. Consequently, in the absence of *in camera* review, the Circuit Court lacked sufficient evidentiary support to find for Respondent.[4] The Circuit Court abused its discretion.

V. Respondent's argument that the Contempt Order rendered "independent findings" contradicts the record, as the Contempt Order was based entirely upon Progressive Direct's non-compliance with the erroneous findings and conclusions of the Initial Order and the Amended Order.

Respondent's claim that the Contempt Order made "independent findings that do not depend on whether Judge McCutchen's privilege analysis" (Respondent's Brief at 23) is incorrect, and there is no basis for the assertion that Progressive Direct has failed to address any alleged "independent findings." By definition, a civil contempt order is based on not complying with an

[4] Respondent also accuses Progressive Direct of "selective production" during the period it claims it was anticipating litigation. Progressive Direct produced outward-facing emails between its adjusters and Respondent's counsel. This is not "selective production." It is further evidence that Progressive Direct only redacted items prepared because of the prospect of litigation.

earlier discovery order cannot be based upon "independent findings" because it is an enforcement mechanism for disobedience with an existing order. *See Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 917 (1982); *see also Cannon v. Georgia Attorney Generals Office*, 397 S.C. 541, 547, 725 S.E.2d 698, 702 (2012) ("Civil contempt . . . seeks only to coerce the defendant to do what a court had previously ordered him to do.") (internal quotations omitted) (emphasis added).

Additionally, a civil contempt order must be reversed when the underlying order from which it is derived is invalid. *See Arnal v. Fraser*, 371 S.C. 512, 522, 641 S.E.2d 419, 522 (2007); *McLean v. Central States, Southeast and Southwest Areas Pension Fund*, 762 F.2d 1204, 1210 (4th Cir. 1985) ("Although a criminal contempt sanction stands even if the underlying order is reversed, reversal of the underlying order ordinarily invalidates any civil contempt sanctions predicated thereon.").

Progressive Direct's principal brief asked this Court to reverse "the orders of the Circuit Court" – including the Contempt Order. As explained above, the Contempt Order is derivative of the discovery orders and must be reversed should the Court reverse the discovery orders. Progressive Direct argued at length that the underlying discovery orders are invalid and should be reversed. As such, Progressive Direct also requested that the Court reserve the Contempt Order. Respondent's argument that Progressive Direct did not challenge the Contempt Order is meritless.

CONCLUSION

For the reasons stated herein and in Progressive Direct's principal brief, this Court should reverse the Initial Order, the Amended Order, and the Contempt Order.

(*Signature Page to Follow*)

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