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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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

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Appellate Case No. 2026-000301

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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.

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**FINAL BRIEF OF APPELLANT PROGRESSIVE DIRECT INSURANCE COMPANY**

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I. Did the Circuit Court err in finding that an insurance carrier's claim log notes created after Respondent's legal counsel sent a *Tyger River* settlement demand letter stating the intention to file a lawsuit against both the insured driver in a motor vehicle accident and against the insurance carrier itself if the carrier did not tender its full insurance policy limits were not created in anticipation of litigation and in ordering the non-party insurance carrier to produce those claim log notes created after the threat of litigation?

II. Did the Circuit Court err in ordering a non-party insurance carrier to produce information from its insurance claim log notes pertaining only to insurance coverage analysis and loss reserves in response to a subpoena in a personal injury lawsuit where the carrier issued a policy of insurance to the defendant?

III. Did the Circuit Court err in ordering a non-party insurance carrier to produce information redacted from its insurance claim log notes without reviewing the redacted information to assess whether it was properly withheld from production?

## STATEMENT OF THE CASE

This appeal calls upon the Court to address whether it is reasonable for an insurance carrier to anticipate litigation when a lawyer representing an opposing claimant sends a letter telling the insurance carrier it should anticipate litigation. The issues on appeal arise from a discovery dispute involving a subpoena *duces tecum* issued by Respondent Richard Weatherford to non-party Progressive Direct Insurance Company ("Progressive Direct"). Specifically, the discovery dispute pertains to Progressive Direct redacting certain limited information from production as protected work product created in anticipation of litigation and certain proprietary information as not relevant to the subject matter of the underlying lawsuit.

The underlying personal injury lawsuit involves a motor vehicle collision between Respondent and Defendant Timothy Davidson. Progressive Direct is Davidson's automobile liability insurance carrier. Three weeks before filing the lawsuit, Respondent sent a *Tyger River* settlement demand letter to Progressive Direct, demanding that Progressive Direct tender its full insurance policy limits by a specified date, and specifically warning that Respondent would sue both Davidson and Progressive Direct itself if Progressive Direct did not comply with the demand. Progressive Direct evaluated the claim and determined that a policy limits settlement was not warranted at that time. Respondent followed through on the stated intention and filed this lawsuit on the date stated in the litigation demand letter.

Eleven days after filing the Complaint, Respondent served a subpoena *duces tecum* on Progressive Direct. The subpoena commanded Progressive Direct to produce its entire insurance claim file related to the motor vehicle collision created in the ordinary course of business, prior to Progressive Direct's retention of legal counsel. It specifically allowed for Progressive Direct to redact "notes, comments, writings, remarks, or other writings/materials contained therein which represent subjective mental impressions, analysis, opinions, evaluations, and/or financial evaluations and reserves setting of Progressive Direct Insurance Company and/or its legal counsel." Progressive Direct complied by timely producing a copy of its entire claim file in response to the subpoena, except it redacted claim log notes entered after Progressive Direct received the litigation demand letter, as these notes were created in anticipation of the threatened litigation. Additionally, Progressive Direct redacted claim log notes related to insurance coverage analysis and loss reserves, as these notes pertain only to the insurance carrier's coverage investigation and are not relevant to the subject matter of the pending lawsuit – a motor vehicle collision. Progressive Direct provided a privilege log with its production, describing all redacted information. Nothing else was withheld from production—only the redactions from the claim log.

Alleging the response to be incomplete, Respondent filed a "Motion and Rule to Show Cause," arguing that both categories of redacted claim log notes should be produced. The Circuit Court granted Respondent's motion, ordering Progressive Direct to produce all claim log notes created after Respondent's letter threatening litigation and up to the day before Davidson filed an

Answer to Respondent's Complaint – despite the fact that those materials were created by a liability insurer in anticipation of specifically threatened litigation. The Circuit Court also ordered Progressive Direct to produce the claim log notes related to insurance coverage and loss reserves – despite the facts that the subpoena specifically stated Progressive Direct could redact that information and that insurance coverage and loss reserves have no bearing on the subject matter of this motor vehicle collision case. The Circuit Court did not review any of the withheld claim log notes before concluding they were not protected work product created in anticipation of litigation and were subject to discovery.

Progressive Direct filed a motion to alter or amend the Circuit Court's Order. The Circuit Court issued an Amended Order stating it "granted in part" Progressive Direct's request for relief, although the Amended Order restated the same conclusions and again ordered Progressive Direct to produce the subject claim log notes. The Circuit Court again did not review any of the redacted claim log notes before concluding they were not protected work product prepared in anticipation of litigation – despite Progressive Direct's request to do so.

Progressive Direct did not comply with the Circuit Court's Orders. Respondent filed a Motion requesting that Progressive Direct be held in contempt of court. On January 28, 2026, the Circuit Court entered an Order holding Progressive Direct in contempt of court and awarding monetary sanctions. This appeal timely followed.

## <u>FACTUAL AND PROCEDURAL BACKGROUND</u>

### I. Progressive Direct receives Respondent's *Tyger River* demand letter threatening litigation.

On November 22, 2024, Respondent Richard Weatherford and Defendant Timothy Davidson were involved in a motor vehicle collision in Berkeley County, South Carolina. (R. p. 38). Respondent alleges that Davidson struck Respondent's vehicle and left the scene of the accident. (R. p. 39). As a result of the collision, Respondent submitted a claim under a personal automobile insurance policy issued by Progressive Direct to Davidson (the "Policy"). Shortly thereafter, in November 2024, Progressive Direct opened a claim file and began its investigation. (R. p. 61).

On February 17, 2025, Respondent sent a letter to Progressive Direct entitled TIME SENSITIVE OFFER OF SETTLEMENT TYGER RIVER HIT AND RUN (the "Litigation Demand Letter"). (R. pp. 63, 144-149). Progressive Direct received the Litigation Demand Letter on February 18, 2025. (R. p. 60). The Litigation Demand Letter demanded that Progressive Direct tender the full bodily injury and property damage liability coverage limits available under the Policy by March 10, 2025. (R. p. 148). The Litigation Demand Letter was replete with references to lawsuits and judgments and set out in unambiguous terms Respondent's intentions to file both a lawsuit against Davidson and an insurance bad faith lawsuit against Progressive Direct should Progressive Direct not accept the terms of the demand. (R. pp. 144-149). Specifically, the Litigation Demand Letter stated:

> Please understand that in making this offer, it is our intention that your client's personal assets will not be exposed should a ***judgment award*** exceed the limits of his/her BI and PD liability coverage . . . .
>
> . . .
>
> Your failure to make this request in a timely manner will also be used as an example of bad faith in failing to properly evaluate this claim.
>
> . . .
>
> Finally, by agreeing to execute a Covenant Not To Execute, we are agreeing to protect your insured's personal assets, but we are not agreeing to additional "indemnification" language or "confidentiality" provisions.
>
> . . .
>
> This correspondence is submitted pursuant to the holding set forth in *Tyger River Pine Co. v. Maryland Casualty Co.,* 161 SE 491, 163

> 229 (1931) (sic), its progeny, and SC Code Ann. 38-59-40 (Law. Co-op. 1987). Further this correspondence is submitted for settlement purposes only in this underlying claim, and for purposes of establishing the absence of good faith ***in any subsequent proceedings***.

(R. pp. 148-149) (emphasis added).

For multiple pages, the Litigation Demand Letter threatened the likelihood of punitive damages against Progressive Direct's insured – which, of course, can only be obtained through litigation.

Despite sending a letter telling Progressive Direct it should anticipate litigation, Respondent contends Progressive Direct's claim log notes were not created in anticipation of litigation. However, upon receiving the Litigation Demand Letter, Progressive Direct transferred the claim handling from the adjuster who had been handling the claim to a different, litigation adjuster for further handling in anticipation of the forthcoming litigation. (R. p. 170). Progressive Direct did not accept the terms of Respondent's Litigation Demand Letter. (R. p. 48). As a result, on March 10, 2025 – the precise day stated in the Litigation Demand Letter – Respondent filed this lawsuit, one of the "subsequent proceedings" mentioned in the Litigation Demand Letter. (R. p. 31).

## II. Respondent serves a subpoena *duces tecum*, and Progressive Direct produces every document in its claim file but redacts limited claim log notes created in anticipation of litigation and containing irrelevant, proprietary information that the subpoena specifically stated could be redacted.

On March 21, 2025 – eleven days after filing the lawsuit and multiple weeks before Davidson appeared in the lawsuit[1] – Respondent served a subpoena *duces tecum* (the "Subpoena")

[1] Respondent did not comply with the requirement of Rule 45(a)(4) to serve a copy of the subpoena on Defendant Davidson before serving it on Progressive Direct.

on Progressive Direct through the South Carolina Department of Insurance. (R. pp. 53-57). The Subpoena commanded Progressive Direct to do the following by May 5, 2025:

> Please produce a complete color copy of any and all investigative files, insurance files, claim handler files, videos, photographs, audio recordings, written statements, documents, records, notes, writings, and/or any other files/materials in your possession, custody, and/or control, or otherwise reasonably accessible to you, reflecting any and all facts, evidence, and/or investigation relating to or undertaken into the motor vehicle collision which occurred at S. Live Oak Drive and Lazy Hill Drive in Berkeley County on November 22, 2024 which serves as the subject of Progressive Direct Insurance Company's Claim #24-822889253, which was/were created, obtained, secured, identified, located or otherwise came into your possession, custody or control in the ordinary course of Progressive Direct Insurance Company's business and/or PRIOR TO Progressive Direct Insurance Compnay [sic] retention of counsel relative to this claim. This request should be construed as requesting production of any and all documents . . . prior to the retention of defense counsel for the defense of this claim (**<u>and subject to the pre-production redaction of notes, comments, writings, remarks, or other writings/materials contained therein which represent subjective mental impressions, analysis, opinions, evaluations, and/or financial evaluations and reserves setting of Progressive Direct Insurance Company</u>** and/or its legal counsel.)

(R. p. 57) (emphasis added).

On May 5, 2025, Progressive Direct, through counsel, responded to the Subpoena by sending a letter to Respondent's counsel (the "Subpoena Response Letter"), along with a link to Progressive Direct's production of documents. (R. pp. 59-67). The Subpoena Response Letter set forth an itemized list of every document produced in response to the Subpoena – approximately 715 pages making up Progressive Direct's ***entire claim file*** other than limited claim log notes redacted on the basis of protected work product or irrelevant, proprietary information. (R. pp. 60-64). Many of the documents were medical records provided to Progressive Direct by Respondent. (R. pp. 60-64). Additionally, the Subpoena Response Letter contained a detailed privilege log, which described all redacted information and set forth the privilege(s) or protection(s) applicable to each redaction. (R. pp. 65-66).

Progressive Direct did not withhold a single document from production. The only information Progressive Direct redacted was two categories of claim log notes. (R. pp. 64-66). An insurance claim log is a digital record used to track the status, details, and history of an insurance claim, including substantive analyses and evaluations, consisting of chronological narrative entries by one or more claim representatives. (R. pp. 64-66). The two redacted categories were: (1) claim log notes concerning insurance coverage and/or reserves; and (2) claim log notes created after February 18, 2025, the day Progressive Direct received the Litigation Demand Letter and transferred the claim to a litigation adjuster for handling. (R. pp. 64-66). Progressive Direct clearly communicated its position with respect to these claim log notes:

> [A]ny Claims Log notes referencing "coverage" have been redacted. This is not a coverage action, a bad faith action, nor is Progressive Direct a named party in this action. Therefore, any log notes relating to coverage are irrelevant to any claim or defense in this tort action and are withheld pursuant to Rule 26(b)(1), SCRCP, which limits the scope of discovery to "any matter, not privileged, *which is relevant to the subject matter involved in the pending action* . . . ."
>
> . . . Progressive Direct **is not producing** its Claim Log notes after the date it received Richard Weatherford's *Tyger River* Policy Limit Demand Letter, February 18, 2025. Any entries created on or after February 18, 2025 were prepared in anticipation and the likelihood that litigation would ensue in this matter.

(R. pp. 64, 66).

### III. Respondent files a document titled "Motion and Rule to Show Cause," requesting an Order requiring Progressive Direct to produce claim log notes created in anticipation of litigation and containing irrelevant, proprietary information.

On May 20, 2025, Respondent filed a document titled "Motion and Rule to Show Cause" (the "Show Cause Motion") (R. pp. 48-51). The Show Cause Motion asked the Circuit Court to order Progressive Direct "to produce complete and unredacted claim file materials through the date of the filing of this lawsuit, and for sanctions for failing to comply with a valid subpoena." (R. p. 48). The Show Cause Motion specified that it did ***not*** seek to compel production of "subjective mental impressions, analyses, opinions, evaluations, and/or financial reserves setting," ***which were the only things Progressive Direct withheld from production***. (R. p. 51). Respondent argued that the two categories of claim log notes were "relevant to the central issues of the case" and that they were prepared in the "ordinary course of business," rather than in anticipation of litigation, even though Respondent had stated its clear intention to file a lawsuit and followed through by actually filing the lawsuit. (R. pp. 71, 73).

Progressive Direct submitted a Response in Opposition to the Show Cause Motion, explaining that: (1) Progressive Direct properly redacted claim log notes concerning the insurance carrier's coverage and loss reserves information because such information has no bearing on claims or defenses at issue in the lawsuit and, thus, falls outside the scope of permissible discovery under Rule 26(b)(1), SCRCP; and (2) claim log notes created after Progressive Direct received the Litigation Demand Letter were created in anticipation of litigation and appropriately withheld as protected work product under Rule 26(b)(3), SCRCP. (R. pp. 124-129)

The Circuit Court held a WebEx hearing on the Show Cause Motion on August 20, 2025. (R. p. 448). Progressive Direct reiterated the arguments set forth in its Response in Opposition – that insurance claim log notes concerning coverage and reserves are irrelevant and outside the scope of discovery and that claim log notes prepared after the carrier's receipt of the Litigation Demand Letter are protected work product. (R. p. 456, line 7 - 464, line 13). In addition, Progressive Direct rebutted Respondent's illogical argument that an insurance company cannot simultaneously anticipate litigation and continue to negotiate with a claimant:

> And I'd also note that lawyers and parties to cases continue negotiating --- they negotiate presuit, during suit, at mediation, after

> mediation, on the courthouse steps. But the idea that parties negotiating somehow obliterates work product protection flies in --- in the face of the rule . . . ."

(R. p. 467, lines 6-15).

On September 17, 2025, Progressive Direct filed a Notice of Supplemental Authority, informing the Circuit Court of a September 11, 2025 order in a similar case, which expressly adopted Progressive Direct's argument that claim log notes prepared by an insurance company after it receives a litigation demand letter are protected work product under Rule 26(b)(3), SCRCP. (R. pp. 480-486). Respondent submitted a letter to the Circuit Court in response, arguing that the facts at issue in the September 11, 2025 Order were distinguishable from this case. (R. pp. 487-496).

**IV. The Circuit Court grants Respondent's Show Cause Motion without reviewing the redacted claim log notes, and Progressive Direct files a Motion to Alter or Amend.**

On September 19, 2025, the Circuit Court entered an Order (the "Initial Order") granting Respondent's Show Cause Motion and compelling Progressive Direct to produce all log notes and materials in Progressive Direct's claim file prior to April 7, 2025—almost a month after Respondent filed the lawsuit. This was more expansive than the relief requested by Respondent. The Initial Order also directed Progressive Direct to pay costs in the amount of $500.00. (R. pp. 9-10). The Initial Order rejected Progressive Direct's argument that claim log notes concerning coverage analysis and loss reserves are not relevant to the subject matter of the lawsuit, finding that information about the insurance coverage and reserves was discoverable because it was "relevant to Progressive's investigation and evaluation of this claim." (R. p. 3). However, the Circuit Court conspicuously did not find the information was relevant to the subject matter of this lawsuit and offered no explanation for how an insurance carrier's analysis of whether there is coverage under an insurance policy or the amount of the carrier's loss reserves is relevant to the subject matter of a personal injury lawsuit against an insured driver arising from a motor vehicle accident and to which the insurance carrier is not a party—***especially when the subpoena specifically allowed Progressive Direct to redact that information***. (R. pp. 2-3).

The Initial Order relied solely on recitations of law from cases analyzing first-party insurance claims, but this case involves a very different third-party claim. The issues are not the same, and the Circuit Court failed to recognize that analysis of the issues here with a first-party claim does not apply to a third-party claim.

The Initial Order also held that claim log notes created after Progressive Direct received the Litigation Demand Letter are not protected from disclosure under Rule 26(b)(3), SCRCP, even though the Circuit Court never reviewed the redacted claim log notes. (R. pp. 3-8). The Initial Order misinterpreted Rule 26(b)(3), SCRCP. It also disregarded the facts that Respondent had specifically threatened litigation on February 18, 2026 and that Progressive Direct from that point forward was acting with knowledge that Respondent intended to file a lawsuit and then did file the lawsuit exactly as he said he would do. The Initial Order stated:

> South Carolina law does not recognize any "work product" privilege for pre-litigation files created by insurance adjusters. Most insurance claims are settled without resort to litigation . . . .
>
> Progressive continued to actively engage in settlement negotiations after February 18, 2025. The record shows communications between Progressive's adjusters and Plaintiff's counsel on March 6, April 4, and April 7, 2025, including continued settlement discussions. These communications demonstrate that Progressive's post-demand conduct constituted routine claims handling rather than preparation for litigation.
>
> Progressive's work product assertion fails for the additional reason that the appropriate cutoff date for work production protection is the retention of defense counsel, not the filing of suit of receipt of a demand letter . . . .
>
> Even if Progressive's materials were protected work product, which they are not, Plaintiff has demonstrated substantial need under Rule

> 26(b)(3), SCRCP . . . . What the investigation and notes may have revealed regarding the various explanations for why the Defendant fled the scene and whether he was impaired is a relevant inquiry and Plaintiff is entitled to those facts.

(R. pp. 3, 4, 7, 8).

On September 26, 2025, Progressive Direct filed a Motion to Alter or Amend and for Relief from Prior Order (the "Motion to Alter or Amend"). (R. pp. 138-143). The Motion to Alter or Amend stated that the Circuit Court erred in: (1) granting relief more expansive and/or different than the relief requested by Respondent; (2) ruling on the applicability of the work product doctrine without having reviewed the documents withheld on that basis; (3) relying on non-binding, factually distinguishable authority; (4) applying its own holding inconsistently by ordering Progressive Direct to produce all documents prepared prior to April 7, 2025 when the withheld claim log materials show that Progressive Direct retained defense counsel on March 24, 2025; (5) failing to consider the language of Respondent's subpoena; (6) issuing an order containing patent ambiguities; and (7) ordering Progressive Direct to pay costs under Rule 37(a)(4), SCRCP. (R. pp. 138-143).

**V. The Circuit Court again orders Progressive Direct to produce claim log notes created in anticipation of litigation and containing irrelevant, proprietary information without reviewing the claim log notes.**

On October 8, 2025, the Circuit Court issued an Order granting in part and denying in part the Motion to Alter or Amend (the "Amended Order"). (R. pp. 12-22). The Amended Order repeated the same legal conclusions set forth in the Initial Order. (R. pp. 15-19). It directed Progressive Direct to produce a complete copy of the materials requested in the subpoena through April 7, 2025, again more expansive than the relief requested by Respondent. (R. p. 18). It further ordered, "to the extent Progressive Direct seeks protection of privileged material," that Progressive Direct should send a privilege log to counsel and to the court, even though Progressive Direct's privilege log was provided to Respondent's counsel with its Subpoena Response Letter and had already been filed with the court as Exhibit C to Progressive Direct's Motion to Alter or Amend. (R. p. 18); (R. pp. 65-66).

Moreover, the Amended Order denied Progressive Direct's request for relief as to costs, finding that Progressive Direct "was not substantially justified in withholding information from production, and that such withholding is inconsistent not only with South Carolina discovery law as a whole, but also with prior rulings specifically against Progressive Direct on substantially similar arguments." (R. pp. 19-20). Despite Progressive Direct's request that the court review the redacted information *in camera*, the Circuit Court still reached these conclusions without reviewing any of it.

**VI. Progressive Direct declines to produce its work product, and the Circuit Court issues an Order holding Progressive Direct in contempt.**

The Amended Order did not provide the relief Progressive Direct requested. In its Motion to Alter or Amend, Progressive Direct asked the Circuit Court to do one of two things: (1) vacate the September 19, 2025 Order and enter an Order ruling that Progressive Direct need not produce any more materials; or (2) conduct *in camera* review of the withheld materials and hold a rehearing after it completed its review. (R. p. 143). The Circuit Court did neither of these things. Rather, the Amended Order again directed Progressive Direct to produce "a complete copy of the materials requested in [Respondent's] subpoena and to "create a privilege log . . . to be submitted to the Court and opposing counsel," and it reiterated the Court's prior order that Progressive Direct pay costs of $500. (R. pp. 13-21). Progressive Direct did not ask the Circuit Court to do any of these things.

Therefore, Progressive Direct declined to comply with the Orders so as to accept an appealable order holding it in contempt. Progressive Direct did not produce any additional documents and did not pay the costs ordered by the court. On October 30, 2025, Respondent filed a motion requesting that Progressive Direct be held in contempt of court (the "Motion for Contempt"). (R. pp. 161-166). Progressive Direct filed a response to the Motion for Contempt, reiterating its prior arguments and explaining that, in order to pursue the underlying issues on appeal, it must refuse to comply. (R. pp. 167-180).

The Court held a hearing on January 7, 2026 on Respondent's Motion for Contempt. (R. p. 470). Progressive Direct's counsel explained in that hearing:

> Progressive Direct's position on this is that if Progressive Direct does comply with the order, this 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, [an] [in]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.

(R. p. 475, lines 12-20).

On January 28, 2026, the Circuit Court issued an Order holding Progressive Direct in contempt of court and awarding monetary sanctions (the "Contempt Order"). (R. pp. 23-29).

Progressive Direct filed its Notice of Appeal on February 11, 2026. On February 18, 2026, Respondent filed a Motion to Dismiss, and Progressive Direct submitted a Return. On April 24, 2026, this Court issued an Order denying Respondent's Motion to Dismiss.

## **STANDARD OF REVIEW**

The Circuit Court misinterpreted court rules to apply an incorrect legal standard to Progressive Direct's assertion of work product protection because it misinterpreted the plain language of Rule 26(b)(3), SCRCP. Interpretation of court rules is a question of law, which this Court reviews de novo. *Garrison v. Target Corp.,* 435 S.C. 566, 577, 869 S.E.2d 797, 803 (2022).

A circuit court's rulings on discovery matters are reviewed under an abuse of discretion standard. *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989). "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *Sundown Operating Co., Inc.* v. *Intedge Inds., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). A circuit court abuses its discretion when it "misapprehends or misapplies the applicable law." *Wicomico Nursing Home v. Padilla*, 910 F.3d 739, 750 (4th Cir. 2018).

Civil contempt orders are reviewed for abuse of discretion and should be reversed if they are based on "incorrect law or inadequate evidence." *See Campione v. Best,* 435 S.C. 451, 458, 868 S.E.2d 378, 381 (Ct. App. 2021).

## ARGUMENT

### I. Claim log notes created by Progressive Direct after its receipt of the Litigation Demand Letter threatening litigation are protected from disclosure pursuant to Rule 26(b)(3), SCRCP, and the Circuit Court erred in ordering Progressive Direct to produce them.

#### A. Rule 26(b)(3), SCRCP unambiguously protects materials prepared in reasonable anticipation of litigation by an insurer prior to the commencement of a lawsuit.

The Circuit Court misinterpreted the plain language of Rule 26(b)(3), SCRCP and, in doing so, applied an incorrect legal standard to Progressive Direct's work product assertion. The Rule straightforwardly states that materials prepared in anticipation of litigation by an insurer are protected from discovery. The Rule ***does not state*** that this protection applies only after suit is filed, or only after litigation is certain to occur, or only after defense counsel is retained. The Circuit Court imposed limitations on Rule 26(b)(3), SCRCP that appear nowhere in its text. It then applied that erroneous standard to strip Progressive Direct of protections specifically afforded to it by the Rule. This was error.

Interpretation of the *South Carolina Rules of Civil Procedure* is a question of law, and this Court affords no deference to the Circuit Court's interpretation. *Garrison,* 435 S.C. at 577, 869

S.E.2d at 803; *Ex parte Travelers Home and Marine Ins. Co. v. Stringfellow*, 427 S.C. 238, 241, 830 S.E.2d 718, 720 (Ct. App. 2018) ("Interpretation of a rule is a question of law we review de novo."); *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012) ("[A] reviewing court is free to decide questions of law with no particular deference to the trial court."). A lower court "by definition abuses its discretion when it makes an error of law." *United States v. Rybicki*, 96 F.3d 754, 757 (4th Cir. 1996) (citing *Koon v. United States*, 518 U.S. 81, 100 (1996)).

In interpreting court rules, this Court applies the same rules of construction used to interpret statutes. *Personal Care, Inc. v. Theos*, 426 S.C. 78, 85, 825 S.E.2d 281, 285 (Ct. App. 2019). "If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Id.* The court's "role in interpreting a statute or court rule is to determine what the legislature [or Supreme Court] intended to accomplish." *Ex parte Travelers Home and Marine Ins. Co.*, 427 S.C. at 241, 830 S.E.2d at 720. The best evidence of the intent behind a rule is the language that appears in the rule. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The Circuit Court ignored Rule 26(b)(3)'s stated meaning and, instead, relied on a distorted interpretation that improperly constricts the reach of work product protection. *See Green By and Through Green v. Lewis Truck Lines, Inc.,* 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (noting the words of a court rule "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule."). Directly contradicting the plain language of Rule 26(b)(3), the Circuit Court held: (1) "South Carolina law does not recognize any 'work-product privilege' for pre-litigation files created by insurance adjusters;" and (2) "the appropriate cutoff date for work product protection is the retention of defense counsel . . . ." (R. pp. 4, 7). [2] The Court ignored the reality that, ***when a lawyer tells an insurer it should anticipate litigation, it is reasonable for that insurer to anticipate litigation***. In fact, it would be unreasonable for the insurer not to anticipate litigation. The Circuit Court's statements are blatantly at odds with text of the Rule, which states:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared ***in anticipation of litigation*** or for the trial by or for another party or ***by or for that other party's representative*** (***including his*** attorney, consultant, surety, indemnitor, ***insurer***, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Rule 26(b)(3), SCRCP (emphasis added).

This language is unmistakable, and it communicates two critical points that the Circuit Court incorrectly applied. First, Rule 26(b)(3) specifically protects materials generated before the commencement of a lawsuit. The key phrase is ***"in anticipation of*** litigation." By definition, "anticipation" must arise at some point in time before the expected event takes place. *Anticipation*, Merriam-Webster, https://www.merriam-webster.com/dictionary/anticipation (last visited June 5, 2026) ("a prior action that takes into account or forestalls a later action; the act of looking forward"). One does not anticipate something that has already occurred, but when a lawyer representing an opposing claimant sends a letter telling the insurance carrier it should anticipate litigation, it is reasonable for that insurance carrier to anticipate litigation. If "pre-litigation"

[2] The Circuit Court also concluded, with no basis, that "defense counsel's involvement began no earlier than April 7, 2025," *id.* at 8, apparently only because defense counsel filed an Answer on behalf of Davidson to Respondent's Complaint the following day, April 8, 2025.

materials fall outside the scope of Rule 26(b)(3), the phrase "in anticipation of litigation" is rendered meaningless. Of course, that is not the way courts interpret statutes and court rules. *See Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 364, 798 S.E.2d 555, 558 (2017) (rejecting an interpretation which would render language "meaningless and thereby violate[] our rules of statutory construction").

In the seminal case on the work product doctrine, the United States Supreme Court confirmed that work product protection extends to materials prepared well in advance of a lawsuit. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (holding memoranda created several weeks after a tugboat accident—eight months before litigation commenced—were protected by the work protect doctrine and fell "outside the arena of discovery."). This is because litigation may be "anticipated" long before it occurs, and a person or entity engages in substantive and strategic communications in anticipation of that litigation that should be protected from disclosure well before the litigation actually commences. *Id.* at 509-12. Likewise, in South Carolina, courts look not to whether litigation has already commenced, but whether it is prospective. *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 293, 692 S.E.2d 526, 530 (2010). The Circuit Court's conclusion that "South Carolina does not recognize any work product privilege for pre-litigation files" simply cannot be gleaned from the text of Rule 26(b)(3), and it is contrary to the purpose and history of the work product doctrine.

Second, Rule 26(b)(3) expressly applies to insurers, regardless of whether an attorney is involved. While the work product doctrine is sometimes colloquially referred to as the "attorney work product doctrine," this is a misnomer. *See, e.g., Manitowoc Co., Inc. v. Kachmer*, No. 14 C 09271, 2016 WL 4493454 at *9, n.4 (N.D. Ill. Aug. 26, 2016) ("Manitowoc uses the nomenclature 'attorney work product,' a misnomer that leads it astray in its argument."). Rule 26(b)(3) expressly includes the word "insurer" among those to whom the Rule applies. Nothing in the Rule states or implies that an insurer's work product in anticipation of litigation is only protected when an attorney is involved. Rather, when a lawyer representing an opposing claimant sends a letter telling the insurance carrier it should anticipate litigation, it is reasonable for that insurance carrier to anticipate litigation, and the insurer's communications are then protected from disclosure. *See, e.g., Muhler Co., Inc. v. State Farm Fire & Cas. Co.,* No. 2:17-cv-01200-DCN, 2019 WL 2419016 at *2 (D.S.C. June 10, 2019) ("An insurer may claim protection of the work product doctrine without the existence of an attorney-client relationship."); *State Farm Fire and Cas. Co. v. Admiral Ins. Co.,* 225 F.Supp.3d 474, 483 ("By the plain text of the Rule, an insurer may claim the protection of the work product doctrine – an attorney-client relationship is unnecessary."). As such, the Circuit Court erred in concluding that the appropriate "cut off" for purposes of Rule 26(b)(3), SCRCP is the retention of defense counsel.

In sum, Rule 26(b)(3), SCRCP must be interpreted according to its plain meaning, and the Rule plainly affords protection to materials prepared in anticipation of litigation by an insurer, before the commencement of a lawsuit. The Circuit Court's interpretation of Rule 26(b)(3) cannot be reconciled with the plain text of the Rule. In turn, its findings and conclusions premised upon this interpretation are "controlled by an error of law" and cannot stand. *See Stafford v. Bojangles' Rests., Inc.*, 123 F.4th 671, 678 (4th Cir. 2024) (holding misapplication of Rule 23, SCRCP amounted to abuse of discretion warranting reversal).

**B. A letter from an attorney communicating a claimant's intent to file a lawsuit with plausible ability to do so creates an objectively reasonable anticipation of litigation in the recipient, and internal notes prepared in response to that letter are protected from disclosure under Rule 26(b)(3), SCRCP.**

Rule 26(b)(3), SCRCP protects claim log notes created by Progressive Direct after it received the Litigation Demand Letter. On February 18, 2025, Respondent notified Progressive Direct that he intended to initiate a lawsuit against Progressive Direct and its insured for the purpose of obtaining a "judgment award." (R. p. 148). Upon receiving a letter from a claimant's lawyer stating that Progressive Direct should anticipate litigation, Progressive Direct acted accordingly and anticipated litigation. The letter was a credible threat of litigation from which Progressive Direct reasonably anticipated litigation would ensue and began handling the claim with the expectation that litigation was forthcoming. Indeed, Respondent filed this lawsuit less than three weeks later, on the exact date stated in the Litigation Demand Letter. (R. p. 31). Therefore, Progressive Direct's claim log notes prepared after February 18, 2025 are protected from disclosure under Rule 26(b)(3). The Circuit Court erred in ordering Progressive Direct to produce its work product, and this Court should reverse the Circuit Court's orders on this basis.

**(1) The Circuit Court failed to recognize the important distinction between first-party insurance claims and this third-party insurance claim, relying only upon wholly inapplicable case law pertaining to first-party claims.**

The Circuit Court relied on unsupported and incorrect assumptions about the role and "ordinary business" of a ***liability insurer*** in connection with a ***third-party insurance claim***. The Circuit Court failed to recognize the crucial distinction between first-party and third-party insurance claims, instead deciding that an insurer's claim file is never protected work product until the insurer retains an attorney. (R. pp. 4, 7-8). Tellingly, the Circuit Court relied solely on recitations of law from cases analyzing first-party insurance claims in reaching this conclusion, but this case involves a very different third-party claim. The issues are not the same, and the analysis of a first-party claim does not apply to a third-party claim.

Without considering the text of the Litigation Demand Letter, the Circuit Court determined that Progressive Direct must not have reasonably anticipated litigation before retaining defense counsel simply because "[m]ost insurance claims are settled without resort to litigation," making the inexplicable statement that "the appropriate cutoff date for work product protection is the retention of defense counsel." (R. pp. 4, 7-8). As an initial matter, this is not an appropriate basis for determining that a specific insurer, in a specific case, that received a specific demand letter, cannot invoke protections afforded to it by Rule 26(b)(3), SCRCP. Moreover, while not all insurance claims result in litigation, all ***third-party*** insurance claims bear the possibility that the insured will incur legal liability. Of course, the insured cannot incur legal liability without litigation. Thus, the prospect of litigation – the standard for work product protection in this State – is inherent in all third-party insurance claims. *McMaster*, 387 S.C. at 294, 692 S.E.2d at 530.

In the Initial Order, the Circuit Court cited *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655 (S.D. Ind. 1991), for the proposition that factual inquiry taken in order to arrive at a claim decision is produced "in the ordinary course of an insurer's business and not work product." (R. p. 4). This reasoning is expressly limited to first-party insurance claims. To be sure, Judge Foster, the author of *Harper*, also wrote "one would expect there to be more litigation on third-party claims than on direct first-party contract actions, with a resultant increased anticipation of litigation in the third-party context." *Henderson v. Zurn Inds.,* 131 F.R.D. 560, 571, n.11 (S.D. Ind. 1990).

While it is true that insurers have a duty to investigate and evaluate claims, this does not mean every act taken by an insurer in connection with a claim is "ordinary business" for purposes of the work product doctrine, particularly after a lawyer representing an opposing claimant sends a letter telling the insurance carrier it should anticipate litigation. This is especially true in the context of third-party liability claims – like Respondent's claim in this case. Unlike first-party claims – which are premised upon a contract between the insured and the insurer – third-party liability claims are premised upon the insured's potential liability to a claimant in tort. *See Muhler Co., Inc.*, 2019 WL 2419016, at *2 (D.S.C. June 10, 2019). ("[I]nsurance claim files generated in relation to investigating and defending against third-party claims are generally considered work-product because they were clearly prepared for the purposes of the underlying litigation, rather than in the insurer's ordinary course of business.") (citing *Smith v. Scottsdale Ins. Co.*, 40 F.Supp.3d 704, 720 (N.D. W. Va. 2014), *aff'd*, 621 Fed.Appx. 743 (4th Cir. 2015)).

Indeed, many courts have held that ***the entirety of*** a liability insurer's file is prepared in anticipation of litigation and therefore protected from disclosure because the purpose of liability insurance is to pay on behalf of the insured should the insured be found legally liable to the claimant. Again, legal liability can be established only through litigation. *See, e.g., Jones v. Tauber & Balser, P.C.*, 503 B.R. 162, 194-95 (N.D. Ga. 2013) ("Where, as here, an underlying third party liability claim is involved, the federal courts have generally recognized that the investigation is made in anticipation of claims which will . . . likely lead to litigation."). *Underwriters Ins. Co. v. Atlanta Gas Light Co.,* 248 F.R.D. 663, 668 (N.D. Ga. 2008) ("[L]itigation surrounding the [claim] was imminent from the moment [the insurer] was notified of the claim. [The insurer] was first contacted about the claim by [the claimant's] lawyer."); *Goodyear Tire and Rubber Co. v. Chiles Power Supply, Inc.,* 190 F.R.D 532, 538 (S.D. Ind. 1999) ("The difference between first and third party claims is important in preserving the underlying purpose of the work product privilege."); *Bill Ackerman Tire Center, Inc. v. Soltis*, No. 2:13-CV-1647 TLN CKD, 2014 WL 12576236, at *1 (E.D. Cal. Feb. 20, 2014) ("In this case, the claims file was created by the professional liability insurer for a third party claim made against its insured . . . . Plaintiffs have not justified invading the work product protection."); *Amy's Kitchen, Inc. v. Stukel Mountain Organics LLC*, No. 1:16-CV-00071-CL, 2016 WL 9406695, at *4 (D. Or. Sept. 28, 2016) ("[T]he relationship between a liability insurer and a third-party claimant is innately antagonistic, and the prospect for litigation is high.").

As the United States District Court for the District of Colorado explained:

> When an insured presents a first party claim, he is asking for payment under the terms of the insurance contract between him and the insurance company, and the insurance company owes him a duty to adjust his claim in good faith. There is no initial contemplation of litigation . . . . By contrast, when a liability insurer investigates a third party claim, the investigation is made in anticipation of claims which, if denied, will likely lead to litigation. Although a claim may be settled short of litigation or legal action, there always is the possibility that the claim will end in litigation . . . . In a sense ***liability insurance is nothing more than litigation insurance.*** For this reason, it is logical to conclude that, while claim files generated in relation first party claims are made in the ordinary course of business and are discoverable, ***files generated during the investigation of third party claims are made in anticipation of litigation and are not discoverable.***

*Weitzman v. Blazing Pedals, Inc.,* 151 F.R.D. 125, 126 (D. Colo. 1993) (internal citations omitted) (emphasis added).

Motor vehicle liability insurance exists to protect insured drivers against legal liability incurred through lawsuits. As numerous courts, including the United States District Court for the District of South Carolina, have rightly concluded, claim files prepared by a liability insurer in connection with a third-party liability claim – as distinct from a first-party claim – are prepared because of and in anticipation of legal liability. In this case, Progressive Direct's claim log notes exist, not because of any contractual obligation to Respondent, but because of the possibility that its insured would incur ***legal liability***. As a result, Progressive Direct's claim log notes after receiving the Litigation Demand Letter were prepared in anticipation of litigation and are protected pursuant to Rule 26(b)(3), SCRCP.

**(2) The plain language of the Litigation Demand Letter created an objectively reasonable anticipation of litigation.**

Progressive Direct reasonably anticipated litigation in this case on February 18, 2025 – when Respondent told it to do so. As such, claim log notes prepared after February 18, 2025 are protected under Rule 26(b)(3), SCRCP.

(a) <u>Case law provides that materials created after receiving a demand letter threatening litigation are created in anticipation of litigation.</u>

Numerous state and federal courts across the country 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. When a lawyer representing an opposing claimant sends a letter telling the insurance carrier it should anticipate litigation, it is reasonable for that insurance carrier to anticipate litigation. *See, e.g., Mizner Grand Condo. Ass'n v. Travelers Prop. Cas. Co. of Am.,* No. 09-82280-CIV-MARRA/JOHNSON, 2011 WL 13174649 (S.D. Fla. Feb. 24, 2011) ("The Court agrees with Travelers, and finds that [the claimant's] demand letter constitutes a bona fide threat from which Travelers could reasonably anticipate litigation."); *Sutter v. Am. Fam. Ins. Co.,* No. 1:20-cv-974, 2022 WL 1605458, at *7 (S.D. Ohio May 20, 2022) ("The Court's review shows these claims log notes were prepared 'because of' [the insurer's] subjective anticipation of litigation, which the Court determines was objectively reasonable in light of the specific threat of the 'immediate' filing of a lawsuit in plaintiff's demand letter."); *Arestad v. Lib. Mut. Fire Ins. Co.,* No. C22-175RSM, 2022 WL 17832194 at * 3 (W.D. Wash. Dec. 21, 2022) ("[T]he Court agrees with Liberty Mutual that it was reasonable to anticipate litigation after it received Plaintiff's counsel's demand letter . . . ."); *Leahy v. State Farm Mut. Auto. Ins. Co.,* 3 Wash.App.2d 613, 630, 418 P.3d 175, 184 (Wash. Ct. App. 2018) (holding trial court did not abuse its discretion "in protecting documents that State Farm produced after [the claimant] sent her demand letter "); *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."); *Phillip v. Caterpillar Inc.*, No. 2:23-CV-00265-SCJ-JCF, 2025 WL 4060560, at *4 (N.D. Ga. Mar. 13, 2025) ("The undersigned is satisfied that the underlying facts provided by Defendant – that the item listed on its privilege log was created after receipt of the demand letter . . . in anticipation of litigation . . . demonstrate proper application of the work product protection to the item at issue."); *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 395 (S.D.N.Y. 2015) ("To start off, we accept BOC's contention that . . . BOC anticipated the potential for litigation as a result of the threat in the Demand Letter."); *Ruta v. Delta Air Lines*, 324 F.Supp.2d 524, 526 (S.D.N.Y. 2004) ("I conclude that Delta was on notice on July 23, 2001 – one month after the incident in question – that litigation was likely to ensue from the incident. On that date, plaintiff's counsel sent a demand letter to Delta.")

As in all of the above cases, Respondent sent a Litigation Demand Letter to Progressive Direct telling Progressive Direct that he planned to file this lawsuit. (R. pp. 144-149). The Litigation Demand Letter presented a bona fide threat from which Progressive Direct reasonably anticipated that litigation was forthcoming. And, as forecasted in the Litigation Demand Letter, Respondent did in fact commence litigation without delay, on the exact day they said they would. (R. p. 31).

(b) <u>The language of the Litigation Demand Letter itself demonstrates that Progressive Direct reasonably anticipated litigation upon receiving it.</u>

The Litigation Demand Letter speaks for itself. First, it was titled <u>TIME SENSITIVE OFFER OF SETTLEMENT TYGER RIVER HIT AND RUN</u>. The referenced *Tyger River* doctrine signals a plaintiff's intention to file an insurance bad faith lawsuit against an insurance company.

There is no reason, other than to prompt the recipient to anticipate a bad faith **<u>lawsuit</u>**, for Respondent to highlight the *Tyger River* doctrine in a letter to an insurer. Additionally, the Litigation Demand Letter was replete with references to lawsuits and judgments. For multiple pages, the Litigation Demand Letter threatened the likelihood of punitive damages against Progressive Direct's insured – which, of course, can only be obtained through litigation. R. pp. 145-147). The Litigation Demand Letter specifically advised that, by accepting the demand, Progressive Direct could protect its insured's personal assets against a judgment.(R. p. 148) ("[B]y agreeing to execute a Covenant Not to Execute, we are agreeing to protect your insured's personal assets . . . ."). Moreover, the Litigation Demand Letter stated that it was sent "for purposes of establishing the absence of good faith in any subsequent proceedings." (R. p. 149).

The thrust of the Litigation Demand Letter is clear to anyone who reads it. Respondent gave Progressive Direct a choice to immediately tender its insurance policy limits or subject its insured to a "subsequent proceeding" (a lawsuit) and a potential "judgment award" (obtainable only through a lawsuit). (R. pp. 148-149). At that point, the only plausible conclusion was that Progressive Direct – a liability insurer handling an innately adversarial third-party claim – should anticipate that litigation was forthcoming. Again, Respondent confirmed Progressive Direct's anticipation by filing this lawsuit ***on the exact day he said he would.*** It is incredulous to suggest that an insurance carrier who receives a letter from a lawyer stating the intention to commence litigation should not anticipate litigation or that the carrier's internal communications thereafter are not protected work product created in anticipation of litigation.

In a recent case, the United States District Court for the District of South Carolina considered factors affecting whether a communication from a claimant's attorney caused an insurance company to anticipate litigation. In so doing, the court highlighted the importance of the content of the claimant's letter – something the Circuit Court ignored here. *Constan Gervais Street Car Wash, Inc. v. Auto-Owners Ins. Co.,* 350 F.R.D. 264 (D.S.C. 2025). In *Constan*, the letter in question "contain[ed] no mention or threat of future action" and no indication that the claimant "would press its rights if it did not receive a favorable determination." *Id.* at 268. In fact, the letter's "stated purpose was rather to bring certain matters to [the insurer's] attention." *Id.* As such, the court held that the letter did not establish that litigation was "justifiably anticipated." *Id.*

Respondent's words matter. Unlike the letter in *Constan*, Respondent's Litigation Demand Letter was not sent for the mere purpose of bringing matters to Progressive Direct's attention. Moreover, the Litigation Demand Letter ***did*** contain "mention or threat of future action." (R. pp. 148-149). It ***did*** indicate that Respondent would "press his rights" if Progressive Direct did not meet his demand. (R. pp. 148-149). In fact, the letter stated it was sent for the specific purpose of establishing bad faith in "subsequent proceedings." (R. p. 149). By its plain terms, the Litigation Demand Letter put Progressive Direct on notice that litigation would ensue. As such, on February 18, 2025, Progressive Direct had an objectively reasonable anticipation of litigation. In fact, it would have been <u>unreasonable</u> for Progressive Direct to reach any other conclusion.

For these reasons, claim log notes created: (1) by a liability insurer, (2) in connection with an adversarial third-party claim, (3) after it received a letter threatening a lawsuit which Respondent filed on the precise day identified in his letter were prepared in anticipation of litigation and are protected work product pursuant to Rule 26(b)(3), SCRCP. The Circuit Court abused its discretion in compelling production of these notes. As such, the Court should reverse the Circuit Court's orders.

### C. Progressive Direct's settlement discussions with Respondent's counsel do not supplant the protections afforded by Rule 26(b)(3), SCRCP.

Additionally, the fact that Progressive Direct continued to engage in settlement discussions with Respondent's counsel has no bearing on whether it reasonably anticipated litigation, and the Circuit Court erred in relying on this fact in rejecting Progressive Direct's assertion of work product protection.

Without even a single reference to the Litigation Demand Letter, the Circuit Court held that Progressive Direct must not have anticipated litigation on February 18, 2025 because it was still negotiating with counsel for Respondent at that time. (R. pp. 4-7). Specifically, the Circuit Court noted that "the record shows communications between Progressive's adjusters and Plaintiff's counsel on March 6, April 4, and April 7, 2025, including continued settlement discussions."(R. p. 4). For this reason, the Circuit Court held that Progressive Direct did not anticipate litigation until April 8, 2025 – nearly a month after Respondent filed this lawsuit – because that is when settlement negotiations "finally broke down" and Davidson filed an Answer. (R. p. 5).

However, whether a party is negotiating with its adversary is not the standard for work product protection in South Carolina – or in any other jurisdiction. This standard cannot reasonably be gleaned from the text of Rule 26(b)(3), SCRCP. Indeed, nothing on the face of the Rule states or implies that one cannot create protected work product while engaging in good faith settlement discussions.

Such a strained application of Rule 26(b)(3), SCRP is nonsensical and impractical given the normal progression of a civil lawsuit. Parties (including their lawyers and insurers) engage in settlement discussions at every stage of a case: pre-suit, at mediation, at trial, and even post-trial. If negotiating a claim and preparing for litigation cannot co-exist – as the Circuit Court's Orders suggest – then Rule 26(b)(3), SCRCP serves no useful purpose in our system. Nothing would ever be protected work product. For example, parties to nearly every civil case are required by law to participate in mediation. Rule 3, SCADR. Of course, mediation generally occurs after a lawsuit has been filed, while all parties are undoubtedly in "litigation preparation mode." (R. p. 8). Pursuant to the Circuit Court's flawed reasoning, a party's mediation outline would be discoverable because it was prepared before settlement negotiations "finally broke down." (R. p. 5).

This is simply not the law in South Carolina. Whether or not a party – or an insurer – is engaged in settlement discussions is irrelevant to whether it prepared a document in anticipation of litigation. In this case, the Litigation Demand Letter itself shows that Progressive Direct reasonably anticipated litigation on February 18, 2025, irrespective of whether it was still negotiating on behalf of its insured.

For these reasons, the Circuit Court erred in rejecting Progressive Direct's assertion of work product protection based upon the irrelevant fact that Progressive Direct continued to negotiate with counsel for Respondent after February 18, 2025.

### D. Respondent failed to demonstrate "substantial need" required to overcome the protections afforded by Rule 26(b)(3), SCRCP.

The Circuit Court also erred in finding that Respondent made a showing of substantial need and undue hardship sufficient to overcome the protections of Rule 26(b)(3), SCRCP. As a threshold matter, the Circuit Court failed to consider whether the withheld claim log notes were fact work product or opinion work product. This analysis is a prerequisite to the availability of the substantial need exception. Moreover, even if the claim log notes did constitute fact work product, Respondent failed to demonstrate substantial need and undue hardship.

**(1) The Circuit Court failed to consider whether the redacted claim log notes were opinion work product entitled to absolute protection.**

The Circuit Court erred because it failed to consider the difference between fact work product and opinion work product. This was error, as the distinction is critical to the applicability of the substantial need exception.

Rule 26(b)(3), SCRCP provides that a party may obtain materials prepared in anticipation of litigation "only upon a showing that the party . . . has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." However, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning the litigation." *Id.*

This language creates two categories of work product: "fact work product" and "opinion work product." *State Farm Fire and Cas. Co. v. Admiral Ins. Co.,* 225 F.Supp.3d 474, 484 (D.S.C. 2016). Fact work product "can be discovered upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship." *In re Grand Jury Proceedings*, *Thursday Special Grand Jury Sept. Term, 1991*, 33 F.3d 342, 348 (4th Cir. 1994). Conversely, opinion work product, including mental impressions, conclusions, opinions, and legal theories, 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). "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Hickman*, 329 U.S. at 510.

As such, the substantial need exception only becomes relevant once it is determined that withheld materials constitute fact work product, as opposed to opinion work product. The Circuit

Court never made such a determination in this case.[3] (R. pp. 8, 12-22). Therefore, the Circuit Court erred in even considering the substantial need exception.

**(2) Respondent failed to demonstrate substantial need of the protected materials and undue hardship in obtaining the substantial equivalent of the protected materials by alternate means.**

Even in applying the substantial need exception, which should not have been applied at all as explained above, the Circuit Court nevertheless applied it incorrectly. Respondent failed to present evidence sufficient to overcome the protections of Rule 26(b)(3). Thus, the Circuit Court erred in allowing Respondent to invade the work product protection.

In order to overcome the protection afforded to fact work product, the requesting party must establish: (1) that he has a substantial need for the protected materials; (2) and that he cannot obtain the substantial equivalent of such materials without undue hardship. *Muhler Co., Inc.,* 2019 WL 2419016, at * 4. “This burden is a difficult one and is satisfied only in rare situations, such as those involving witness unavailability.” *Id.* Generally, there is no substantial need for a document protected by the work product doctrine when the information contained therein can be obtained by a deposition.[4] *See, e.g., Trammell v. Anderson College,* No. 8:05-3213-HMH-WMC, 2006 WL 1997425, at *2 (D.S.C. July 17, 2006); *Hohenwater v. Roberts Pharmaceutical Corp.,* 152 F.R.D. 513, 516-17 (D.S.C. 1994).

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[3] As discussed later, the Circuit Court could not have made this determination because it never reviewed the claim log notes.

[4] Some courts recognize a narrow exception to this rule for documents capturing a witness statement made “immediately after an accident.” *See, e.g., Bryant v. Trucking*, No. 4:11-cv-2254-RBH, 2012 WL 162409, at *3 (D.S.C. Jan. 18, 2012). Such a statement is “so unique that substantial need is present based solely on the contemporaneous nature of the statement.” *Id.* However, it is undisputed here that the claim log notes Respondent seeks were created on or after February 18, 2025 – nearly three (3) months after the November 2024 motor vehicle collision. *See* (May 20, 2025 Mot., p. 2). Thus, the claim log notes could not describe statements made “immediately after the accident.” *Id.* at *4 (“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 . . . .”).

This case does not present the sort of rare situation warranting intrusion into Progressive Direct's work product. In support of his substantial need argument, Respondent averred that Progressive Direct's claim log notes created in anticipation of litigation after Respondent notified Progressive Direct of his intention to file a lawsuit are "crucial to this case" because they may contain information regarding Davidson's driving record, Davidson's claim that he suffered a medical emergency, and Davidson's post-collision conduct. (R. pp. 68, 74). The Circuit Court agreed and determined that Progressive Direct's claim log notes could reveal "why [Davidson] fled the scene and whether he was impaired," finding this amounts to substantial need. (R. p. 8).

However, why Davidson left the scene of the accident, whether he was intoxicated, and whether he experienced a medical emergency are all facts readily obtainable through traditional discovery means, and Progressive Direct provided all information in its claim file regarding all of these points up to the time Respondent made clear his intention to file a lawsuit. Respondent did not dispute this in any proceedings before the Circuit Court. In fact, Respondent's counsel acknowledged that he sought this information only for "impeachment purposes." (R. p. 488); *see In re Grand Jury Investigation*, 599 F.2d 1224, 1232 (3d Cir. 1979) ("[T]he desire to impeach or corroborate a witness's testimony, by itself, [cannot] overcome the protection . . . .").

Respondent has offered no support for the position that invading Progressive Direct's work product created in anticipation of litigation after Respondent notified Progressive Direct of his intent to file a lawsuit is the only way he can get information. Davidson is a party to this lawsuit. Respondent presented no evidence that Davidson is unavailable to sit for a deposition or that he is incapable of responding to a written discovery request. Because Respondent can obtain the information he seeks without invading Progressive Direct's work product, he failed to demonstrate substantial need and undue hardship.

Consequently, the Circuit Court erred in finding that Respondent established substantial need and undue hardship sufficient to overcome Rule 26(b)(3).

***

In sum, the Circuit Court erred because it misinterpreted and misapplied Rule 26(b)(3) by imposing limitations on work product protection that appear nowhere on the face of the Rule and that are contrary to the very purpose of the Rule.

The Circuit Court also erred in finding that Progressive Direct's claim log notes were not work product prepared in anticipation of litigation because it ignored the inherent difference between a first-party and third-party insurance claim, ignored the text and stated purpose of the Litigation Demand Letter, and based its ruling on unsupported and/or irrelevant facts.

Finally, the Circuit Court erred in concluding that the substantial need exception applied because it skipped a mandatory step in the work product analysis and because Respondent produced no evidence of substantial need and undue hardship.

For all of these reasons, this Court should reverse the orders of the Circuit Court and issue a ruling that Progressive Direct properly redacted claim log notes entered after February 18, 2025 because they are work product pursuant to Rule 26(b)(3), SCRCP.

## II. Claim log notes pertaining to insurance coverage and financial loss reserves do not in any way relate to the subject matter of this lawsuit, and the Circuit Court erred in compelling their production.

Parties may only obtain discovery on matter which is "relevant to the subject matter of the pending action." Rule 26(b)(1), SCRCP. Claim log notes documenting Progressive Direct's coverage analysis and setting loss reserves have no bearing on liability, damages, or any other issue at play in this motor vehicle collision case. As the Circuit Court noted but failed to incorporate into its analysis, such notes relate only to Progressive Direct's investigation and evaluation of the insurance claim—not to the subject matter of the pending action, which is the proper scope of discovery under Rule 26(b)(1). (R. p. 3).Therefore, the notes fall outside the scope of permissible discovery fixed by Rule 26(b)(1), SCRCP.

While the scope of discovery is intentionally broad in this State, "there are limits," and the trial court is tasked with imposing such limits. *Oncology and Hematology Assocs. of S.C., LLC v. S.C. Dept. of Health and Envt'l Control,* 387 S.C. 380, 287, 692 S.E.2d 920, 924 (2010). The trial court's duty is heightened in matters involving non-parties – like Progressive Direct. *See Virginia Dept. of Corrections v. Jordan,* 921 F.3d 180, 189 (4th Cir. 2019) ("When discovery is sought from nonparties, however, its scope must be limited even more.").

Rule 26(b)(1) establishes the scope of discovery and is applicable to subpoenas. *See IntegraMed America, Inc. v. Patton*, 298 F.R.D. 326, 331 (D.S.C. 2014) ("The scope of discovery allowed under a subpoena is the same as the scope of discovery allowed under Rule 26.") (citing *HDSherer LLC v. Natural Molecular Testing Corp.*, 292 F.R.D. 305, 308 (D.S.C. 2013)). The Rule provides as follows:

> (b) Scope of Discovery: Unless otherwise limited by an order of the court in accordance with these rules, the scope of discovery is as follows:
>
> > (1) In General. Parties may obtain discovery regarding any matter, not privilege, which is ***<u>relevant to the subject matter involved in the pending action</u>***, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense or any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b), SCRCP (emphasis added).

This is a personal injury case, not an insurance coverage or insurance bad faith case. The "subject matter" involved in ***this lawsuit*** (the "pending action") is a motor vehicle collision. (R.

pp. 38-39). Respondent contends that Davidson struck his vehicle and caused him to sustain injuries and damages. (R. pp. 38-42). Davidson denies these allegations and asserts that he suffered a medical emergency. (R. pp. 44-45). The parties' claims and defenses have nothing to do with insurance coverage or loss reserves. Therefore, claim log notes concerning coverage and loss reserves are irrelevant and not discoverable. *See ContraVest Inc. v. Mt. Hawley Ins. Co.,* No. 9:15-cv-00304-DCN-MGB, 2016 WL 11200705, at *4 (D.S.C. Dec. 12, 2016); *see also Imperial Textiles Supplies Inc. v. Hartford Fire Ins. Co.*, No. 6:09-cv-03103-JMC, 2011 WL 1743751 (D.S.C. May 5, 2011) (noting that reserve information is irrelevant even in the context of a coverage dispute); *Silva v. Basin Western, Inc.,* 47 P.3d 1184, 1193 (Colo. 2002) ("We are convinced that the purposes of discovery are not served by allowing discovery or reserves and settlement authority in a third-party personal injury claim . . . .").

The Circuit Court's flawed reasoning underscores the impropriety of Respondent's quest for Progressive Direct's claim log notes in this case. In deciding that claim log notes concerning coverage analysis and loss reserves were discoverable, the Circuit Court stated that "[c]overage determinations and reserve information are relevant to understanding Progressive's investigation and evaluation of this claim." (R. p. 3). The Circuit Court ***did not*** find the information was relevant to the subject matter of this lawsuit and offered no explanation for how an insurance carrier's coverage analysis or the amount of the carrier's loss reserves is relevant to the subject matter of the underlying personal injury lawsuit, especially when the subpoena specifically allowed Progressive Direct to redact that information. (R. pp. 2-3).

For these reasons, the Circuit Court erred in ordering Progressive Direct to produce claim log notes concerning coverage and reserves. This Court should reverse the orders of the Circuit Court and issue a ruling that Progressive Direct properly redacted claim log notes concerning coverage and loss reserves because they are outside the scope of discovery pursuant to Rule 26(b)(1), SCRCP.

## III. The Circuit Court erred in ruling on relevance and privilege objections without first reviewing the redacted claim log notes.

The Circuit Court also erred by concluding that redacted claim log notes were relevant and were not protected work product without even reviewing the redacted material.

A trial court abuses its discretion when it rules on the application of the work product doctrine without reviewing the documents over which the protection is asserted. *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 537, 787 S.E.2d 485, 495-96 (2016). Here, the Circuit Court's Initial Order proclaimed, "South Carolina law requires an inquiry into whether documents were prepared 'in anticipation of litigation.'" (R. p. 7). Yet, the Circuit Court did not follow its own instructions. It did not make such an inquiry – even after Progressive Direct asked it to do so in its Motion to Alter or Amend. (R. p. 143).

Beyond ignoring its own recitation of law, the Circuit Court also violated the Supreme Court's clear directive in *Stokes-Craven*. In that case, a plaintiff filed a legal malpractice suit against its former attorney after an adverse jury verdict against the plaintiff in an underlying case. 416 S.C. at 521-22, 787 S.E.2d at 487-88. The attorney filed a motion for summary judgment, arguing that plaintiff's claims were barred by the statute of limitations. *Id.* at 523, 787 S.E.2d at 488. The plaintiff filed a cross-motion for summary judgment, as well as a motion to compel discovery. *Id.* The motion to compel sought correspondence between the attorney and his legal malpractice carrier, which the attorney had withheld on grounds that the correspondence was prepared in anticipation of litigation. *Id.*

The trial court granted the attorney's motion for summary judgment. *Id.* Even though the grant of summary judgment mooted the discovery dispute, the trial court proceeded to rule on the motion to compel. *Id.* at 524, 787 S.E.2d at 488. The trial court determined that the correspondence was protected by the work product doctrine. *Id.* However, the trial court did not review the withheld documents *in camera* before issuing its ruling. *Id.*

On appeal, the Supreme Court reversed the grant of summary judgment. *Id.* at 535-36, 787 S.E.2d at 495. Additionally, it reversed the denial of the motion to compel, 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.* As such, the court "lacked sufficient information to determine whether the requested documents were prepared in anticipation of litigation . . . ." *Id.* at 537, 787 S.E.2d at 496. Ultimately, the Supreme Court remanded the case to the trial court with instructions to "conduct an in camera hearing, review the requested information, and issue a specific ruling." *Id.*

Just like the trial court in *Stokes-Craven*, the Circuit Court here failed to: (1) conduct *in camera* review; (2) review the requested information; and (3) issue a specific ruling. Instead, it relied on an incorrect legal standard and unsupported assumptions about materials it never saw. Notably, the Circuit Court failed to review the claim log notes even after Progressive Direct filed a Motion to Alter or Amend specifically offering to submit the notes for *in camera* review. (R. p. 143) ("Progressive Direct requests a rehearing once the Court has had the opportunity to consider the attached materials and to review the withheld items *in camera*, which can be submitted at the Court's request for *in camera* review."). Rather than mitigate its error and review the notes, the Circuit Court again ordered Progressive Direct to "produce a complete copy of the materials requested in [Respondent's] subpoena . . . as previously ordered." (R. p. 18). Because it did not review the claim log notes, the Circuit Court lacked any evidentiary basis to support the rulings rendered in the Initial Order and Amended Order. According to the Supreme Court in *Stokes-Craven*, this was an abuse of discretion.

For these reasons, Progressive Direct – in the alternative to its arguments set forth in Sections I and II above – respectfully requests that the Court remand this matter to the Circuit Court with specific instructions to review the redacted claim log notes *in camera*.

## **CONCLUSION**

The Circuit Court erred in ordering non-party Progressive Direct to produce claim log notes prepared in anticipation of litigation. When a lawyer representing an opposing claimant sends a letter telling a liability insurance carrier it should anticipate litigation, it is reasonable for that insurance carrier to anticipate litigation, and the insurer's claim file materials after that point are protected from disclosure under Rule 26(b)(3), SCRCP. The Circuit Court also erred in ordering Progressive Direct to produce information regarding its coverage analysis and loss reserves, which are irrelevant to the subject matter of the pending action and outside the scope of discovery established by Rule 26(b)(1), SCRCP. Finally, the Circuit Court erred in ruling on relevance and privilege without reviewing the documents redacted on those grounds. For these reasons, this Court should reverse the orders of the Circuit Court.

(*Signature Page to Follow*)

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