THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely

APPELLATE CASE NO. 2025-000318

Peter Bouharoun, Opus Petrus, LLC……Appellants,

v.

Bouharoun Package Store, Inc., Patricia Bouharoun ……Respondents,

---

BRIEF OF APPELLANT

Luke A. Burke
Burke Law, LLC
Post Office Box 4885
Greenville, South Carolina 29608
(864) 735-8289

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. WHETHER EXECUTED ESTATE PLANNING DOCUMENTS, INCLUDING RESPONDENT'S LAST WILL AND TESTAMENT, ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE DURING RESPONDENT'S LIFETIME WHERE ALL PARTIES AGREE THE DOCUMENTS ARE RELEVANT TO THE CASE.

SUMMARY OF FACTS

Peter Bouharoun ("Son") is the son of Patricia Bouharoun ("Mother"). (R. p. 9 ¶ 8; p. 17 ¶ 8). While the parties disagree on the percentage of Mother's ownership, Mother is at least majority owner of Bouharoun Package Store, Inc. (the "Store"). (R. p. 9 ¶ 12; p. 17 ¶ 12). In 1992, Son began managing the Store. (R. p. 9 ¶ 13; p. 17 ¶ 13). To induce Son to manage the Store with deferred payment, Appellant's allege Mother agreed to execute a Last Will and Testament naming Son as her personal representative and leaving the Store solely to Son when she passed away. (R. p. 9 ¶¶ 13-14). Mother subsequently executed a Last Will and Testament with the above terms. (R. p. 9 ¶ 16; p. 17 ¶ 16). Son has continued to manage the Store since 1992. (R. p. 9 ¶ 17; p. 17 ¶ 17).

On February 14, 2022, Mother filed a Durable Power of Attorney revoking her Power of Attorney naming Son as agent and instead naming her daughter and son-in-law as agent and alternative agent. (R. p. 10 ¶ 28; p. 18 ¶ 28). In or around June 2022, Son learned that Mother had revised her Last Will and Testament. (R. p. 11 ¶ 30). Mother admits that she revised her Last Will and Testament. (R. p. 19 ¶¶ 32-33).

STATEMENT OF THE CASE

On March 21, 2024, Appellants filed their Summons and Verified Amended Complaint alleging in part that Mother breached her agreement with Son by modifying her Last Will and Testament to remove Son as personal representative and sole beneficiary of the Store and

requesting specific performance of the agreement. (R. pp. 11-12). On October 18, 2024, Mother filed her Answer and Counterclaim. (R. p. 16). On November 8, 2024, Appellant's filed their Reply. (R. p. 27).

On October 18, 2024, Respondents responded to Appellants' First Set of Requests for Production. (R. p. 70). In response to Appellants' request for Mother's current and former Last Will and Testament and any other estate planning documents, Respondents objected, stating those documents are protected by the attorney-client privilege. (R. pp. 68-69 ¶¶ 18-19). On October 21, 2024, Appellants served a Notice of Video Deposition of Mother. (R. pp. 58-59). On October 21, 2024, Mother filed a Motion for Protective Order reiterating her objection that her current Last Will and Testament and estate planning documents are protected by the attorney-client privilege. (R. p. 56 ¶ 5). On January 13, 2025, Appellants filed a Memorandum in Opposition to Motion for Protective Order. (R. p. 74).

On January 16, 2025, a hearing on Mother's motion was held before the Honorable Perry H. Gravely. (R. pp. 2, 6). The recording of this hearing is unavailable for transcription. (R. p. 84). On January 23, 2025, the court concluded that Mother's Last Will and Testament and related estate planning documents are protected by the attorney-client privilege during her lifetime. (R. p. 5). On February 21, 2025, Appellants filed their Notice of Appeal. (R. p. 86).

STANDARD OF REVIEW

"A trial court's ruling on a discovery matter will not be disturbed on appeal except where there is an abuse of discretion." Owens v. Stirling, 438 S.C. 352, 358, 882 S.E.2d 858, 861 (2023) (citing Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989)). "The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion." Dunn, 298

S.C. at 502, 381 S.E.2d at 735 (citing Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (Ct. App. 1985)). An abuse of discretion may be found where an appellant shows that the conclusion reached by the lower court lacks reasonable factual support, resulted in prejudice to the right of the appellant; and, therefore, amounted to an error of law. Id.

ARGUMENT

I. THE COURT ERRED IN FINDING THAT RESPONDENT'S EXECUTED ESTATE PLANNING DOCUMENTS ARE PROTECTED FROM DISCLOSURE BY THE ATTORNEY-CLIENT PRIVILEGE DURING HER LIFETIME.

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of 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 ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1) SCRCP.

The purpose of discovery is to ensure "full and fair disclosure" of information that is reasonably calculated to lead to the discovery of admissible evidence. See Samples v. Mitchell, 329 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. 1997). "The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." In re Anonymous Member of S.C. Bar, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001) (quoting In re Alford Chevrolet-Geo, 997 S.W.2d 173, 180 (Tex. 1999)).

> Except as required by the Constitution of South Carolina, by the Constitution of the United States or by South Carolina statute, the privilege of a witness, person or government shall be governed by

> the principles of the common law as they may be interpreted by the courts in the light of reason and experience.

Rule 501 SCRE.

"The [discovery Rules] do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action." Seattle Times Co. v. Rinehart, 467 U.S. 20, 30 (1984). "[P]rivileged matter in South Carolina is matter that is not intended to be introduced into evidence and/or testified to in Court." S.C. State Hwy. Dep't. v. Booker, 260 S.C. 245, 254, 195 S.E.2d 615, 619 (1973). "[N]ot every matter intended to be 'confidential' is necessarily 'privileged.'" Hartsock v. Goodyear Dunlop Tires N. Am. Ltd., 672 Fed. Appx. 223, 227 (4th Cir.) (citing S.C. State Bd. of Med. Examiners v. Hedgepath, 325 S.C. 166, 480 S.E.2d 724, 726 (1997)).

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," Upjohn v. United States, 449 U.S. 383, 389 (1981); see also U.S. v. Aramony, 88 F.3d 1369, 1389 (4th Cir. 1996), cert. denied, 520 U.S. 1239 (1997), and "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." Trammell v. United States, 445 U.S. 40, 51 (1980). "The protection of 'full and frank' communication between lawyer and client 'encourages observance of the law and aids in the administration of justice.'" Hawkins v. Stables, 148 F.3d 379, 382–83 (4th Cir. 1998) (quoting Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985)). "Therefore, when the privilege applies, it affords confidential communications between lawyer and client complete protection from disclosure." Id. The privilege, however, "impedes the full and free discovery of the truth." See id. at 383 (quoting

In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984)). As such, the attorney-client privilege is to be narrowly construed. See id.

> In South Carolina, the attorney-client privilege is defined as follows:
>
> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

In re Mt. Hawley Ins. Co., 427 S.C. 159, 164, 829 S.E.2d 707, 710 (2019) (quoting Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 293, 692 S.E.2d 526, 530 (2010)). "In general, the burden of establishing the privilege rests upon the party asserting it." Id. (quoting Wilson v. Preston, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008)).

"A will is an expression of a testator's intent to dispose of the testator's property after death." In re Estate of Pallister, 363 S.C. 437, 448, 611 S.E.2d 250, 256 (2005).

There is no controlling precedent at the state or federal level on the single issue on appeal – whether executed estate planning documents are protected by the attorney-client privilege during the testator's lifetime where all parties agree the documents are relevant to the case. Further, there is only one court in the nation has published an opinion on this issue. See Bethune v. Bethune, 870 S.E.2d 827 (Ga. Ct. App. 2022). All the other cases that have considered whether to allow testimony about estate planning documents were faced with the issue of whether the attorney who drafted the estate documents could be compelled to testify about the contents and tenor of the documents after the attorney's client was deceased. See In re Estate of Voelker, 396 N.E.2d 398 (Ind. 1979) (copies of unsigned wills prepared for deceased an in possession of his attorney are covered by the privilege); Stappas v. Stappas, 122 So.2d 393, 396 (Ala. 1960) (in cases regarding

the construction of a decedent's will, the drafting attorney "is not precluded from giving evidence of communication relating to the execution or subject matter of the will"); Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico, 869 A.2d 653 (Conn. 2005) (in a contested will case, the attorney-client privilege survives where the communications between the decedent and attorney do not culminate in the execution of a will). In re Estate of Crook, 208 A.2d 655 (N.J. 1965) (communications between decedent and attorney who drafted his will are not protected by the attorney-client privilege after his death).

Bethune is the only reported case where a court actually reached the issue in this appeal. It is an opinion from the Georgia Court of Appeals that has no precedential value in this case. Further, the court's reasoning in *Bethune* was based on two cases that did not consider the issue on appeal: DeLoach v. Myers, 109 S.E.2d 777 (Ga. 1959) and Schaffer v. Fox, 693 S.E.2d 852 (Ga. 2010). Bethune, 870 S.E.2d at 832.

In *DeLoach*, the question presented was:

> Is an attorney, employed by a person to draw a will, competent to testify, under the provisions of Code, § 38-1605, as to conversations with his deceased client relating to instructions in drafting a will, which was never executed, in an action by one against the administrator of the client's estate, seeking specific performance of an alleged oral contract between the plaintiff and the deceased client, to devise all of her estate to the plaintiff?

DeLoach, 109 S.E.2d at 780. Georgia Code § 38-1605 stated:

> No attorney shall be competent or compellable to testify, for or against his client, to any matter or thing, knowledge of which he may have acquired from his client, by virtue of his relations as attorney, or by reason of the anticipated employment of him as attorney, but shall be both competent and compellable to testify, for

> or against his client, as to any matter or thing, knowledge of which he may have acquired in any other manner.

Id. at 779.

The court determined that § 38-1605 did not apply where an attorney was asked to testify about his conversations with the decedent leading up to the execution of a will where the terms of the will were being challenged after the decedent's death. Id. at 780. However, where the will was never executed, § 38-1605 did bar such testimony because in the former case the attorney was testifying in support of his deceased client whereas in the latter case the attorney was testifying against his client's wishes. Id. at 781.

The issue in *DeLoach* was entirely centered on communications between a client and attorney leading up to execution of a last will & testament. The court did not rule upon or even consider whether the executed last will & testament was privileged.

In *Schaffer*, the issue was whether the trial court erred by allowing the decedent's attorney to testify about previous wills he had drafted for the decedent. Schaffer, 693 S.E. at 854. The trial court allowed the attorney to testify over the defendants' objection and the court of appeals affirmed reasoning that a third party could not assert attorney client privilege on behalf of the decedent. Id. at 854-55. However, the court did not decide the issue of whether a will is a privileged document – it simply ruled that the defendants did not have standing to assert the attorney-client privilege at all. Id. at 855.

As such, the issue of whether estate planning documents are protected by the attorney-client privilege during the testator's lifetime truly is an open question in American jurisprudence. Therefore, absent guidance from a statute, the issue should be decided based on the fundamental rules governing when the attorney-client privilege applies to a document. See e.g., Rogers v.

Tennessee, 532 U.S. 451, 472 (2001) ("the judge's 'office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law.'") (Scalia J., dissenting) (quoting Bacon, Essays, Civil and Moral, in 3 Harvard Classics 130 (C. Eliot ed. 1909) (1625)); see also SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 438 (4th Cir. 2015) (Winn J. concurring) ("Here, the judiciously well-reasoned majority opinion resists the temptation to move beyond our limited role and into the colorful realm of policy. Respectfully, the dissenting opinion strays beyond our limited review here and encroaches on policy issues best left to other branches of government.").

The parties do not dispute that Mother's estate planning documents are relevant to this case or may lead to relevant evidence. As such, it is presumed that the documents are discoverable and the burden is on Mother to show that these documents are protected from discovery by the attorney-client privilege.

There is no statutory or common law authority in South Carolina for Mother's assertion that her estate planning documents are protected by the attorney-client privilege during her lifetime. A last will & testament is an executed document evidencing a testator's intent to dispose of the testator's property after death. It is not a "communication" let alone a communication with an attorney seeking or receiving legal advice. Instead, it is the product of a client seeking advice from her attorney and then deciding what to do. Therefore, as the document is not a communication, the attorney-client privilege cannot apply to protect the executed document from disclosure. See e.g., In re Mt. Hawley Ins. Co., 427 S.C. at 164, 829 S.E.2d at 710 (the attorney-client privilege protects *communications* from and to a client seeking legal advice from her attorney).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the circuit court's discovery order and find that Mother's executed estate planning documents, including her last will and testament, are not protected by the attorney-client privilege.

Respectfully submitted,

s/Luke A. Burke
Luke A. Burke (SC Bar # 100033)
BURKE LAW, LLC
Post Office Box 4885
Greenville, South Carolina 29608
(864) 735-8289
lburke@gvlattorney.com

Counsel for the Appellants

Dated: September 26, 2025