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,

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BRIEF OF RESPONDENTS

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1. DID THE CIRCUIT COURT COMMIT A CLEAR ABUSE OF DISCRETION WHEN IT HELD THAT MS. BOUHAROUN'S CURRENT LAST WILL AND TESTAMENT AND RELATED ESTATE PLANNING DOCUMENTS ARE PROTECTED FROM DISCLOSURE BY THE ATTORNEY-CLIENT PRIVILEGE DURING HER LIFETIME?

STATEMENT OF THE CASE

On March 21, 2024, Appellants filed their Summons and Verified Amended Complaint, which alleges, in part, that Respondent Patricia Bouharoun ("Ms. Bouharoun") and Appellant Peter Bouharoun ("Peter") entered into an oral agreement wherein Peter would operate Respondent Bouharoun Package Store, Inc. ("the Store") without receiving regular pay in exchange for Ms. Bouharoun: (1) naming Peter as the personal representative of her estate in her Last Will and Testament; and (2) bequeathing the Store to Peter upon her death. (R. p. 2). As noted in the circuit court's Order, the parties do not dispute that Ms. Bouharoun's current Last Will and Testament and related estate planning documents (collectively, "Testamentary Documents") are relevant to their dispute. However, they disagree as to whether Ms. Bouharoun's Testamentary Documents are protected from disclosure by the attorney-client privilege while she is still alive. (R. pp. 2-3).

On September 23, 2024, Appellants noticed the video deposition of Ms. Bouharoun for a date of "TBD" at 10:00 a.m. at the office of Maynard Nexsen PC, 104 South Main St., Suite 900, Greenville, SC 29601. (R. p. 3). On October 18, 2024, Respondents served responses to Appellants' First Set of Requests for Production, where they objected to producing Ms. Bouharoun's Testamentary Documents on the ground that the documents are protected by the attorney-client privilege during her lifetime. (R. p. 3). Shortly thereafter, on October 21, 2024, Ms. Bouharoun filed a Motion for Protective Order ("Motion") requesting that the circuit court issue an order protecting her from being forced to disclose her Testamentary Documents (including their contents) during her lifetime. (R. pp. 2, 55-57).

On January 16, 2025, a hearing on Ms. Bouharoun's Motion was held before the Honorable Perry H. Gravely ("Judge Gravely"). (R. p. 2). Based on his careful review and consideration of the Motion, the arguments of counsel, and the memoranda submitted by the parties, Judge Gravely issued an Order granting Ms. Bouharoun's Motion on January 23, 2025. (R. pp. 2, 5). After correctly determining that Ms. Bouharoun's Testamentary Documents are protected by the attorney-client privilege during her lifetime, Judge Gravely held that good cause existed to protect Ms. Bouharoun from being compelled to: (1) produce her Testamentary documents during her lifetime; and (2) testify about the contents or terms of those documents during her lifetime. (R. p. 5).

Appellants filed their Notice of Appeal on February 21, 2025. (R. pp. 86-87).

STANDARD OF REVIEW

"A trial court judge's rulings on discovery matters will not be disturbed on appeal absent a clear abuse of discretion." *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citation omitted). "An abuse of discretion occurs when the [circuit court's] ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support." *Ex parte Trustgard Ins. Co.*, 442 S.C. 485, 509, 900 S.E.2d 448, 461 (Ct. App. 2023) (citation omitted). "The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion." *Owens v. Stirling*, 438 S.C. 352, 358, 882 S.E.2d 858, 861 (2023) (quoting *Dunn*, 298 S.C. at 502, 381 S.E.2d at 735).

ARGUMENT

I. This Court Lacks Jurisdiction Over This Appeal Because it is Interlocutory.

As a threshold matter, this Court lacks jurisdiction over this appeal because it is an interlocutory appeal of a discovery order. *See* S.C. Code Ann. § 14-3-330 (providing for appellate

jurisdiction before final judgment over lower court orders "involving the merits" or "affecting a substantial right"); *see also Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) ("[D]iscovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute [S.C. Code Ann. § 14-3-330], involve the merits of the action or affect a substantial right."); *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) (holding that "[d]iscovery orders . . . are interlocutory and are not immediately appealable"); *Wallace v. Interamerican Trust Co.,* 246 S.C. 563, 568, 144 S.E.2d 813, 816 (1965) ("[I]t is settled that an appeal from [an interlocutory] order will not lie before final judgment unless it is one 'involving the merits,' or 'affecting a substantial right.'"); *Ferguson v. Charleston Lincoln/Mercury, Inc.*, 344 S.C. 502, 510, 544 S.E.2d 285, 290 (Ct. App. 2001) ("As a general rule, a discovery order is not immediately appealable because it is an interlocutory order.").

Here, the circuit court's Order does not involve the merits because it only concerns the discovery of evidence. Nor does it affect a substantial right of Appellants because it does not preclude them from continuing to seek judgment in their favor based upon other admissible evidence. Accordingly, this Court should dismiss Appellants' interlocutory appeal at the outset for lack of jurisdiction.

II. Even if This Appeal Were Proper, the Circuit Court Did Not Commit a Clear Abuse of Discretion When it Held That Ms. Bouharoun's Testamentary Documents are Protected From Disclosure by the Attorney-Client Privilege During Her Lifetime.

Even assuming this this appeal were proper – which it is not – this Court should affirm the circuit court's Order because the circuit court did not commit a clear abuse of discretion when it held that Ms. Bouharoun's Testamentary Documents are protected from disclosure by the attorney-

client privilege during her lifetime. Indeed, both an abundance of precedent across the country and strong public policy considerations support the circuit court's well-reasoned decision.

As the circuit court recognized, "Parties may obtain discovery regarding any matter, ***not privileged***, which is relevant to the subject matter involved in the pending action . . . ." (R. p. 3) (emphasis added). "The attorney-client privilege has long been recognized in this State and protects against disclosure of confidential communications by a client to his attorney regarding a legal matter." *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 167, 829 S.E.2d 707, 712 (2019). This longstanding common law privilege is "based upon a wise public policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor." *S.C. State Highway Dep't v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 619 (1973). Recognizing the value of protecting such a privilege, South Carolina courts define the attorney-client privilege 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. at 164, 829 S.E.2d at 710.

Contrary to Appellants' position, the question of whether a testator's estate planning documents are protected by the attorney-client privilege during the testator's lifetime is not "an open question in American jurisprudence." Appellant's Br. at 7. In fact, the question is well settled, as numerous courts across the country have consistently held that the contents of a testator's will are protected by attorney-client privilege during the testator's lifetime. *See Bethune v. Bethune*, 870 S.E.2d 827, 832 (Ga. Ct. App. 2022) (citations omitted) (holding that wills that have not been submitted to probate are protected by the attorney-client privilege and are, therefore, not discoverable); *see also Fields v. Dep't of Revenue*, No. TC-MD 040659E, 2005 WL 3108209, at

*5 (Or. T.C. Nov. 17, 2005) (holding that "wills prepared by attorneys are protected by the attorney-client privilege from disclosure"); *Compton v. W. Volusia Hosp. Auth.*, 727 So. 2d 379, 382 (Fla. Dist. Ct. App. 1999) (holding that the plaintiff's will was "protected from disclosure and surrender during her lifetime by the attorney-client privilege"); *In re Guardianship of York*, 44 Wash. App. 547, 553, 723 P.2d 448, 451 (1986) (holding that "a will, drawn by a lawyer at the direction of a client, contains the very essence of the communications from the client relating to his or her wishes, intentions, and desires with respect to the disposition of their property," and is thus subject to the attorney-client privilege); *Edwards v. Edwards*, 151 N.E. 3d 6, 9 (Ohio Ct. App. 2019) (holding that a living defendant's "will and estate planning documents are subject to attorney-client privilege," and thus not discoverable); *Cimini v. Jaspan Schlesinger Hoffman, LLP*, No. CV055952JFBAKT, 2008 WL 11412194, at *3 (E.D.N.Y. Feb. 22, 2008) (holding that "the will of a living person is subject to the attorney-client privilege.")

In addition to the above-referenced cases, a 1990 annotation from the American Law Reports identifies over ***sixty*** additional cases from a myriad of jurisdictions that have "stated expressly or by implication that where a testator's will is prepared by an attorney, it contents are protected from disclosure or surrender, at least during the testator's lifetime, by the attorney client privilege." Tim A. Thomas, Annotation, *Involuntary Disclosure or Surrender of Will Prior to Testator's Death,* 75 ALR 4th 1144 (1990). As this publication correctly recognizes, each time courts have been presented with this issue, they have consistently held – "apparently without exception" – that a living testator's will is protected by the attorney-client privilege. *Id*.

While Appellants seek to undermine the precedential value of one of these cases (*Bethune*), they do so unpersuasively. In *Bethune*, the Georgia Court of Appeals analyzed two previous Georgia opinions holding that attorneys could not be forced to testify about their client's previous

wills before concluding that "the privilege afforded to communications between an attorney and a client extends to wills that have not been submitted to probate." *Bethune*, 870 S.E.2d at 832. The Georgia Court of Appeals then held that the trial court did not abuse its discretion in concluding that the will was privileged. *Id.* at 833. Appellants criticize the Georgia Court of Appeals in *Bethune* for basing its holding on two cases that did not directly consider the issue on appeal. Appellant's Br. at 6. This argument, however, ignores the reality that part of a court's role is to reason inferentially from its own case law and apply the law to different factual circumstances, even if that court has no direct binding precedent. Thus, just because the *Bethune* court reached its conclusion by reasoning inferentially from adjacent case law does not make its holding any less persuasive.

Furthermore, Appellants fail to cite to any authority supporting their position that a testator's will is not privileged during the testator's lifetime, which only reinforces the persuasive nature of the overwhelming amount of authority cited above. Indeed, Appellants cannot offer a single example of a court that has held that a living testator's will is not protected by the attorney-client privilege during the testator's lifetime. Thus, if there is no precedent supporting Appellants' position, it would defy logic to hold that the circuit court committed a "clear abuse of discretion" when it adopted the consistent reasoning of various other courts across the country. *Dunn*, 298 S.C. at 502, 381 S.E.2d at 735.

Appellants' argument that Ms. Bouharoun's will is not protected by attorney client privilege because it is an executed document as opposed to an attorney-client communication is equally unpersuasive. Several of the above-referenced cases held that wills are protected from disclosure by attorney-client privilege while the testator is alive precisely because they are attorney-client communications. *See Suddarth v. Poor*, 546 S.W.2d 138, 141 (Tex. Civ. App. 1977)

(holding that a will "itself constitutes a communication between an attorney and client and owes its existence to an effort to transmit information from one to the other," and is therefore privileged); *In re Guardianship of York*, 44 Wash. App. at 553, 723 P.2d at 451 ("A will, drawn by a lawyer at the direction of a client, contains the very essence of the communications from the client relating to his or her wishes, intentions, and desires with respect to the disposition of their property."); *Compton*, 727 So. 2d at 382 ("Communications with an attorney concerning preparation and drafting a will and the will itself, is as privileged as any other attorney-client communications.") As these cases correctly recognize, a will, which is the product of a protected conversation between an attorney and client, is just as privileged as the conversation itself. That the will was thereafter executed makes no difference in the eyes of various courts across the country, nor should it make a difference here.

Finally, strong public policy considerations weigh against disturbing the confidentiality of estate planning documents while the testator is still alive. Allowing plaintiffs to discover the contents of a living testator's will would set a dangerous precedent, as it would invite a flood of pre-death, quasi-will contests in various courts across the state. Furthermore, there is an equally strong policy interest in encouraging prudential estate planning among young people in order to avoid the strain of intestate succession on the court system. Holding that a living testator's will is not protected by the attorney-client privilege will undermine this policy interest and incentivize younger people to wait until they are older to make their wills in order to avoid exposing themselves to potential litigation. Thus, these policy considerations also support a finding that the circuit court did not commit a clear abuse of discretion when it declined to extend an open invitation to swaths pre-death, quasi-probate litigation.

CONCLUSION

Based on the foregoing, the circuit court did commit a clear abuse of discretion when it held that Ms. Bouharoun's Testamentary Documents are protected from disclosure by the attorney-client privilege during her lifetime. This Court should affirm.

Respectfully submitted,

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Dated: October 1, 2025
Greenville, South Carolina

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Peter Bouharoun, Opus Petrus, LLC……Appellants,

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PROOF OF SERVICE

I hereby certify that I have served the final *Brief of Respondents* on Appellants' counsel of record on this the 1st day of October, 2025, by electronic AIS e-mail only as follows:

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RE: Appellate Case No. 2025-000318
Peter Bouharoun, et al. v. Bouharoun Package Store, Inc., et al.

Dear Ms. Kitchings:

Please find enclosed one (1) bound copy of the final Brief of Respondents for filing in the above-referenced matter. This enclosure is being submitted for electronic filing concurrently with the sending of this correspondence, and a copy of this letter is being filed for the Court's records. Also enclosed is the Proof of Service for service of the final Brief of Respondents on Counsel of Record via electronic service. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

Konstantine P. Diamaduros

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