No. 219A21-1 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

BUCKLEY LLP, Plaintiff-Appellant, v. SERIES 1 OF OXFORD INSURANCE COMPANY, NC, LLC, Defendant-Appellee.	From Mecklenburg County No. 19 CVS 21128

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND ASSOCIATION OF CORPORATE COUNSEL SUPPORTING PLAINTIFF-APPELLANT BUCKLEY LLP

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region in the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Association of Corporate Counsel is the leading global bar association, promoting the professional and business interests of in-house counsel. ACC has over 40,000 members who are in-house lawyers from over 10,000 organizations in more than 85 countries. ACC helps courts, legislatures, regulators, and other law and policy-making bodies understand the role and concerns of in-house counsel. To that end, ACC

[1] In accordance with North Carolina Rule of Appellate Procedure 28(i)(2), amici certify that no person or entity, other than amici curiae, its members, or its counsel, directly or indirectly wrote this brief or contributed money for its preparation.

has worked to safeguard the attorney-client privilege in cases that threaten to erode its protections.

This is one of those cases. If the Supreme Court adopts the trial court's ruling, North Carolina's attorney-client privilege will offer less protection than in the past. For some time now, companies and their lawyers in the State have operated on the understanding that attorney-client communications related to an internal investigation are privileged. For good reason: Internal investigations by attorneys are part and parcel of a company's seeking legal advice, and the confidential communications coming out of them are privileged to ensure frank and open communications between client and counsel about a problem or crisis.

That future is uncertain in North Carolina. With the decision below, the trial court stripped many of those communications of protection from disclosure—at least those made in the context of an internal investigation mandated by company policy—and cast a shadow over investigation-related communications between attorney and client. The decision threatens the free flow of information and legal advice at the time when companies need it most. If affirmed on appeal, it would disincentivize companies from adopting policies requiring investigations,

for fear that doing so will invalidate the attorney-client privilege. And it would chill company employees who participate in investigations from speaking with candor. The attorney-client privilege has always existed to encourage frank communications, so it should come as no surprise that a retreat from the privilege would mark a corresponding retreat from the truth.

STATEMENT OF THE CASE AND FACTS

Amici adopt Plaintiff-Appellant Buckley LLP's Statement of the Case and Facts.

ARGUMENT

The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). Courts guard the privilege because promoting loyalty and trust between attorney and client fosters open and frank communication. *State v. Khalil Abdul Farook,* 850 S.E.2d 592, 595 (N.C. Ct. App. 2020). That expectation of loyalty and trust is the lifeblood of the American legal system. *See Upjohn*, 449 U.S. at 389.

If this Court were to adopt the trial court's reasoning, the loyalty and trust that has defined the attorney-client privilege in the State will give way to uncertainty. The trial court held that certain communications between Buckley LLP and its counsel were not privileged because they arose in the context of a sexual-harassment investigation mandated by company policy. That context, the trial court reasoned, made the attorney-client communications part of the company's standard business practices and thus stripped them of their privileged status. *Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC*, 2020 NCBC 81 ¶¶ 35, 45–48 (N.C.

Super. Ct. 2020). In ruling as it did, the trial court departed from North Carolina precedent and put all companies that do business in the State to a Hobson's choice: Either (1) adopt policies requiring investigations in certain circumstances but be prepared to give up some of the protections of the attorney-client privilege or (2) forgo investigation policies and endure the consequences (both legal and societal) of that choice. Faced with that reality, companies may choose a third option: Avoid doing business in North Carolina.

I. THE TRIAL COURT ERRED IN HOLDING THAT ATTORNEY-CLIENT COMMUNICATIONS LOSE THEIR PRIVILEGED STATUS WHEN AN INVESTIGATION IS REQUIRED BY COMPANY POLICY.

The trial court held that certain of Buckley LLP's communications with outside counsel were not privileged because "the investigation Buckley retained Latham to perform was one required under Buckley's firm policies . . . and consistent with Buckley's business practice." Op. ¶ 45. By the court's view, those communications "were made to or by [outside counsel] solely or primarily in furtherance of its investigation into Sandler's alleged misconduct in accordance with [] firm policies and were unrelated to the rendition of legal services." *Id.* ¶ 48.

That conclusion was error. The trial court reached the wrong conclusion because it misapplied North Carolina law. The trial court claimed to apply the "primary-purpose test"—which asks whether one of the primary purposes of an attorney-client communication was to secure legal advice—but in reality, it applied something closer to a but-for test. It rejected Buckley LLP's privilege claims because the communications in question were in the court's view "solely" or "primarily" part of a company-mandated investigation. Op. ¶43.

North Carolina courts have never taken such a narrow view of the attorney-client privilege. They have, like courts from nearly every other jurisdiction, applied the primary-purpose test. *See Window World of Baton Rouge, LLC v. Window World, Inc.*, 2019 NCBC LEXIS 53, at *65 (N.C. Super. Ct. 2019) (quoting *N.C. Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 517 (M.D.N.C. 1986)) ("When communications contain intertwined business and legal advice, courts consider whether the 'primary purpose' of the communication was to seek or provide legal advice."); *In re Cnty. of Erie*, 473 F.3d 413, 420 (2d Cir. 2007); *In re Grand Jury Subpoena*, 204 F.3d 516, 520 n.1 (4th Cir. 2000); *Montgomery Cnty. v. MicroVote Corp.*, 175 F.3d 296, 301 (3d Cir. 1999);

United States v. Robinson, 121 F.3d 971, 974 (5th Cir. 1997); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759 (D.C. Cir. 2014).

It is no accident that courts across the country follow the primary-purpose test: In today's world, "attorneys employed by corporations serve in many roles" (*Adair v. EQT Prod. Co.*, 285 F.R.D. 376, 380 (W.D. Va. 2012)), so many (if not most) communications between attorney and client reflect more than just legal advice—even as legal advice remains the communication's primary purpose. To be sure, communications between an attorney and their client—even in the context of an investigation—are not *automatically* privileged: The attorney must be doing legal work. But requiring attorney-client communications to reflect *only* legal advice before the privilege attaches would ignore the realities of modern lawyering. *See In re Kellogg*, 756 F. 3d at 759 ("Under the District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law.").

Boiling it down, the trial court seemed to assume that attorney-client communications arising from an internal investigation undertaken in accordance with company policy are not privileged if they reflect both

legal advice *and* business concerns or policies.[2] But as this Court knows, it is often difficult to know when legal advice ends and business concerns begin. Companies often look to their lawyers for more than antiseptic legal advice, and the best lawyers serve as counselors to their clients, advising not just on the technical aspects of legal issues but also on their prudential or moral dimensions. *See* ABA Model Ethical Rule 2.1 ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation."). Consistent with that reality, courts have held that "[i]n the context of an organization's internal investigation, if *one* of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted . . . pursuant to a company policy." *In re Kellogg*, 756 F. 3d at 760 (emphasis added).

[2] The trial court also seems to have created a false dichotomy between "legal services" and "investigative" efforts. Op. ¶¶ 44–48. But investigative efforts—even those undertaken in accordance with a corporate policy—frequently *are* legal services. *In re Kellogg*, 756 F.3d at 758 ("In our view, the District Court's analysis rested on a false dichotomy. So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation . . . .").

The trial court's decision to scuttle the attorney-client privilege for certain investigation-related communications based on Buckley LLP's decision to adopt a policy requiring the investigation invites other questions: What does it mean for a company to have a "policy" requiring internal investigations? Must the policy be written? Can it be inferred from historical practice? What if the company reserves the right to eliminate the policy at any time? What about other "policies" that require the company to consult its counsel before taking some action? Does the company forfeit the attorney-client privilege's protections if it complies with those policies? The trial court's decision to jettison traditional privilege standards invites those and other line-drawing problems. The result is uncertainty, and "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

II. THE TRIAL COURT'S DECISION DISINCENITIVIZES COMPANIES FROM INVESTIGATING COMPLAINTS OR ADOPTING POLICIES REQUIRING INVESTIGATIONS.

Some legal errors produce ripple effects beyond their immediate context. That would prove true in this case: If the Supreme Court allows the decision below to stand, it will discourage companies from adopting policies requiring investigations for fear of forfeiting the attorney-client

privilege. It will also impair internal investigations by discouraging company leaders and counsel from pressing too hard to develop facts in an investigation and by making witnesses less candid for fear that facts shared in confidence will be aired in litigation.

"Good corporate citizens . . . ought not to be placed in the dilemma of choosing between effective internal compliance and the liability risks attendant to full disclosure." Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma Of Internal Compliance Programs*, 50 VAND. L. REV. 1, 45 (1997). Yet that is the dilemma presaged by the trial court's decision.

And the resulting uncertainty would undermine the integrity of internal investigations. Companies "initiate[] internal investigation[s] to gather facts and ensure compliance with the law after being informed of potential misconduct." *In re Kellogg*, 756 F. 3d at 757. To serve those goals, a company undertaking an investigation must be committed to learning the facts, and those who participate in the investigation must feel comfortable answering with the truth. But if a cloud hangs over whether communications from the investigation will survive a privilege challenge, then the company may have less incentive to gather facts, and

witnesses may stop short of full candor. *See* Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113, 1176 (1997) ("Absent the control over confidentiality that the involvement of counsel implies, firms might avoid aggressive self-analyses of internal corporate misconduct (and forego the reforms that such evaluations might identify as being necessary) due to the threat of disclosure of the resulting evaluations.").

The end result? The investigative process becomes less about the truth and more about creating a record for potential litigation. The attorney-client privilege exists "to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn,* 449 U.S. at 390. That is true even in the context of an internal investigation, where the company, not the company's employees, holds the privilege (*id.*); witnesses will be less likely to speak with candor if they know that the company marshaling the investigation may not control whether communications will end up in the hands of third parties.

Which raises other questions: In delivering an *Upjohn* warning, must a company's lawyer tell a witness both (1) that the company (not

the witness) holds any applicable privilege and (2) that there might not be any privilege because under North Carolina law, confidential communications with company counsel that are part of an internal investigation required by company policy may not be privileged at all? Whether a company's lawyers must now give that new warning (or choose to as a matter of good practice), there can be no doubt about how it would affect witnesses: After hearing it, witnesses will disclose less than they would have if they thought that the company could shield their statements from disclosure. With fewer facts and less certain information, companies will find it harder to identify and address misconduct, exacerbating the harm to victims.

CONCLUSION

If this Court adopted the trial court's reasoning, it would call into question the attorney-client privilege over wide swaths of attorney-client communications, promising troubling consequences for the North Carolina business community and those who work for North Carolina businesses. This Court should reverse the decision below and hold that by adopting a policy requiring an internal investigation, Buckley LLP did

not forfeit its privilege over its investigation-related communications with its counsel.

Respectfully submitted August 12, 2021.

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CERTIFICATE OF COMPLIANCE

Under Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Amici certifies that their brief includes no more than 3,750 words.

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CERTIFICATE OF SERVICE

I certify that, on August 12, 2021, I served a copy of the foregoing Brief of Amicus Curiae the Chamber of Commerce and the Association of Corporate Counsel in Support of Plaintiff-Appellant, by electronic means upon the following counsel of record:

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