THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
Court of Common Pleas
The Honorable Debra R. McCaslin, Circuit Court Judge

Appellate Case No: 2021-000487

Trial Court Case No: 2020-CP-10-02902

Michelle Cha Holliman, individually, and as Personal Representative of the Estate of Allen B. Holliman,

Respondent,

v.

We Are Sharing Hope SC, Medical University of South Carolina, United Network for Organ Sharing, Jacqueline Honig, M.D., and Darla Welker,

Defendants,

Of which We Are Sharing Hope SC and United Network for Organ Sharing are the

Appellants.

BRIEF OF RESPONDENT IN RESPONSE TO ALL *AMICUS* BRIEFS FILED IN SUPPORT OF APPELLANTS

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The central question in this appeal is whether We Are Sharing Hope SC ("WASH"), an Organ Procurement Organization ("OPO") is entitled to the privileges from discovery that South Carolina's legislature has selectively bestowed upon South Carolina hospitals, including the right to file an immediate appeal from an interlocutory discovery order.[1] That limited protection from discovery is found in S.C. Code §44-7-392.

Michelle Holliman, the respondent, files this Reply to the *Amicus Curiae* Brief to raise her concerns that this Court is being intentionally misled by the Amicus. Rule 3.3, RPC, Rule 407, SCACR imposes upon South Carolina lawyers a duty of candor toward the tribunal and Comment 4 to that Rule expressly provides that "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal."

In its brief to this Court, the Amicus points this Court to a statute that does not apply to this case and then uses ellipses to hide from the Court the controlling words of the statute. On page 7 of its brief, the Amicus focuses not on S.C. Code §44-7-392 but on S.C. Code §44-7-390 and tells this Court: "Section 44-7-390 provides that: There is no monetary liability on the part of, and no cause for action for damages arising against . . . **external reviewers,** witnesses . . . relating to: . . ." In addition to focusing on the wrong statute, the words of the statute that the Amicus has chosen to hide from the Court are the precise words that are central to the question before it. The actual statute reads:

[1] Under settled South Carolina law, a Circuit Court Order compelling discovery is not immediately appealable. *See e.g., Tucker v. Honda of S.C. Mfg., Inc*., 354 S.C. 574, 577, 582 S.E.2d 405, 406 (2003) ("[W]e note an order compelling discovery does not ordinarily involve the merits of the case and may not be appealed.")

> "There is no monetary liability on the part of, and no cause of action for damages arising against, **a hospital licensed under this article,** its parent, subsidiaries, health care system, physician practices owned by the hospital (its parent or subsidiaries), directors, officers, agents, employees, medical staff members, external reviewers, witnesses, or a member of any committee **of a licensed hospital**, whether permanent or ad hoc, **including the hospital's governing body,** for any act or proceeding undertaken or performed without malice, made after reasonable effort to obtain the facts, and the action taken was in the belief that it is warranted by the facts known, arising out of or relating to: . . ."
>
> S.C. Code §44-7-390 (emphasis added)

The plain and unambiguous language of S.C. Code §44-7-390 – when not hidden by ellipses – is to protect certain hospitals and hospital proceedings from monetary liability. And even WASH – the Appellant -- never once suggests – in its brief or in its reply brief -- that it is entitled to the protections of S.C. Code §44-7-390.

By deleting the statute's repeated references to "a hospital," the Amicus disingenuously asks this Court to apply the statute's privileges against both monetary liability and discovery to anyone who may have reviewed a document or witnessed a tragic event such as the death of the respondent's husband, Alan Holliman. To do so would create a broad-based privilege that is not found in the statute and that the legislature has not approved.[2]

Perhaps even more telling than the deception, however, is the fact that Amicus could not even make their argument that S.C. Code §44-7-390 is a wide-ranging statute without doing precisely what they did and deleting the statute's repeated references to "hospitals." The statute is

[2] In addition, even the words "external reviewers" that the Amicus highlight for this Court follow the statute's use of the word "its" – another word deleted by the use of ellipses. That is, the privilege applies to a hospital's "external reviewers," not to any external reviewer – such as WASH – who is not a part of the hospital and conducts a review of why someone was killed during the organ procurement process.

found under Chapter 7 of the Code that applies to "Hospitals, Tuberculosis Camps and Health Service Districts." The section is entitled "No liability or cause of action against a hospital for certain acts or proceedings." In addition, the statute references "hospital" twelve (12) times in the body of the statute. The only way to broaden the statue is to do precisely what Amicus suggests through its use of ellipses – delete the statute's repeated use of the word "hospital."

To further the deception, the Amicus' next section lists multiple cases that they claim support the argument that WASH is protected from monetary liability by the statute above. Incredibly, not one of the South Carolina decisions cited by the Amicus was issued after the passage of the statute in 2012. In addition, the 1993 case that they rely on involved – as it must -- a hospital. *McGee v. Bruce Hospital System*, 312 S.C. 58, 439 S.E.2d 257 (1993). Of course, they do not mention these critical facts to the Court.

Finally, to underscore the fact that the privilege from discovery applies only to hospitals, the South Carolina Legislature makes that abundantly clear in S.C. Code §44-7-392 – the statute at the heart of this appeal – that is entitled "Confidentiality of hospital proceedings, data, documents, and information." That statute makes clear that the privilege applies only to "**a hospital licensed under this article**, its parent, subsidiaries, health care system, committees, whether permanent or ad hoc, including the hospital's governing body, or physician practices owned by the hospital (its parent or subsidiaries)." The statute reads in full:

> "(A)(1) All proceedings of, and all data, documents, records, and information prepared or acquired by, **a hospital licensed under this article**, its parent, subsidiaries, health care system, committees, whether permanent or ad hoc, including the hospital's governing body, or physician practices owned by the hospital (its parent or subsidiaries), relating to the following are confidential: . . ."
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> S.C. Code §44-7-392 (emphasis added)

By its explicit terms, the statute provides a privilege only to certain specified proceedings of **hospitals** and hospital affiliates: "South Carolina's Legislature enacted S.C. Code Ann. §44-7-392 to separately govern hospital peer review committees." *Howell v. Holland*, No. 4:13-cv-295-RBH-TER, 2014 WL 958277, at *2 (D.S.C. Mar. 10, 2014). The Circuit Court found, as it must, that WASH is not a hospital nor any of the entities described in the statute and even WASH does not dispute that fact.[3]

CONCLUSION

For the reasons cited herein and those in her brief, Ms. Holliman respectfully requests that this Court dismiss this appeal as interlocutory or, in the alternative, affirm the well-reasoned opinion of the Circuit Court.

Respectfully submitted,

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[3] Our Supreme Court has held repeatedly that a Court must follow the plain language of a statute: "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)

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