

**RECEIVED**  
**Sep 14 2022**  
**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA**  
**In the Court of Appeals**

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

Appellate No. 2021-000487  
C/A No. 2020-CP-10-02902

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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.

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**RETURN TO MOTION TO DISMISS**  
**On behalf of Appellant We Are Sharing Hope SC**

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This matter is on appeal from the Order Regarding Discovery issued by the Honorable Debra R. McCaslin which compels production of and discovery responses as to documents/materials which We Are Sharing Hope SC claims are protected by a privilege arising from the self-critical quality assurance and peer-review evaluation it participated in as required by its federal certification as an Organ Procurement Organization (OPO) within the federal Organ Procurement and Transplant Network (OPTN) administered by United Network for Organ Sharing (UNOS), as well as from the Root Cause Analysis with the donor hospital. This appeal presents multiple novel and significant issues of law as identified and argued in this Appellant's briefs.

Preeminently, there is the question posed by Sharing Hope as to whether, and to what extent, a peer review privilege protects post-incident self-critical materials prepared by an OPO pursuant to a requirement of its federal regulatory schema and as part of the Root Cause Analysis with the Donor Hospital. In addition, the Respondent has posed an issue of appellate jurisdiction as to whether the discovery order compelling disclosure of privilege materials is immediately reviewable.

Briefing is complete and the case is ready for oral argument. The Respondent has filed a Motion to Dismiss Appeal for Mootness based on the facts that UNOS submitted documents to a U.S. Senate committee, as compelled pursuant to a subpoena, which included certain protected documents to which Sharing Hope has asserted a peer review privilege, and that the Senate committee, in turn, has publicly released some of the documents at issue in this appeal.

Sharing Hope submits this Return and respectfully urges the Court to deny the motion to dismiss on any or all of several grounds. First and foremost, the issue on appeal is not moot because not all the documents at issue in the appeal have been made public by the Senate committee. In addition, UNOS's production and the Senate's public disclosure of privileged documents raise issues of waiver which need to be addressed before the privilege issues could be considered moot. Ultimately, there is a vital and compelling need for resolution of the novel legal issue as to the very existence of a peer privilege in the context of the post-incident self-critical analysis mandated in the OPTN.

Sharing Hope submits that no response is necessary to the Plaintiff/Respondent's argument in the pending motion that the Appellants are not entitled to take an interlocutory appeal of a circuit court's discovery order. Plaintiff/Respondent raised this appealability issue in her Respondent's brief, and, as can be found in the Appellant's Reply Brief, Sharing Hope maintains that this

interlocutory appeal is allowed under S.C. Code §44-7-394, and pendant appellate jurisdiction. Without restating all those arguments and analysis in this Return, Sharing Hope would respectfully direct the Court's attention to the briefs wherein the appealability issue has been fully briefed.

Sharing Hope similarly submits that no response is necessary to the Plaintiff/Respondent's argument that the South Carolina peer review statute does not apply to Sharing Hope since the OPO is not a hospital. This is one of the core points on appeal. It is a unique and novel issue that needs a definitive disposition – for purposes of the discovery motion at bar and also for evidentiary purposes at trial as well as for the future operations of the South Carolina OPO. Again, without restating all the arguments and analysis in this Return, Sharing Hope would respectfully direct the Court's attention to the briefs.

### **PERTINENT BACKGROUND**

The relevant factual background and procedural history can be found in the appellate briefs along with a full discussion of the important and novel issues presented on appeal from Judge McCaslin's order. For the purpose of the pending motion, Sharing Hope offers this brief background to provide context for the mootness question posed by Plaintiff/Respondent's motion to dismiss.

This case arises out of the death of Allen B. Holliman ("the Recipient") after he underwent a double-lung transplant on November 27, 2018. The Plaintiff presents claims against MUSC where the transplant surgery was performed, and claims against UNOS and Sharing Hope in connection with the process and procedures by which the organs were donated. All of Plaintiff's claims are focused on the manner and method by which the transplant organs were identified as a blood type match for the Recipient – a process that involves several different organizations who are part of the OPTN.

The OPTN is operated by UNOS under an exclusive contract with the federal government and oversees and coordinates its various member transplant hospitals and OPOs, including Sharing Hope which is the sole designated and certified OPO for organ recovery services in South Carolina. Sharing Hope engaged in a mandatory self-critical quality assurance and peer review process conducted with UNOS in connection with the organ donation which forms the basis of this lawsuit. Sharing Hope also conducted a Root Cause Analysis with the donor hospital. As discussed in the briefing, Sharing Hope argues that the materials are protected by a peer review privilege under South Carolina's two peer review statutes, S.C. Code Ann. § 40-71-20 and § 44-7-392, and/or Virginia law, and/or federal law. Sharing Hope also argues, in the alternative, that the statutory peer review privileges should be expanded to cover its peer review materials based on compelling public policy grounds. The peer review privilege questions before the Court are novel because Sharing Hope has never been placed in the position of having to assert the peer review privilege in any litigation, and the questions are unique because Sharing Hope is the only OPO in the State of South Carolina.

As represented by Plaintiff/Respondent, federal public records evidence that the United States Senate Finance Committee has been conducting an investigation into UNOS to address "concerns with UNOS's oversight of the U.S. Organ Procurement and Transplantation Network (OPTN), specifically concerning its policy compliance and patient safety activities related to organ procurement organizations (OPOs)." [Motion/Exhibit C – Memorandum reporting on a hearing titled "A System in Need of Repair: Addressing Organizational Failures of the U.S.'s Organ Procurement and Transplantation Network" to be held August 3, 2022.] That memorandum/report states that UNOS has produced "hundreds of thousands of pages of documents and internal memoranda" in response to a subpoena. [Id. p. 4.]

It appears that, as of this date, the Senate committee has publicly published some portions of the documents produced by UNOS. Approximately one-hundred and fifty of those pages made public are documents to which Sharing Hope has asserted peer review privilege in this litigation. The undersigned Counsel of Record for Sharing Hope was not served by the Senate committee with any subpoena and Sharing Hope has never executed any written waiver of its privilege authorizing production and/or publication of these documents.

More specifically, Sharing Hope has listed 335 pages of peer review documents related to this case on its privilege log.<sup>1</sup> The undersigned counsel have reviewed the pertinent documents made public by the Senate committee with the August 3<sup>rd</sup> report as “Appendix B – ABO Incompatibility Case 2” which includes 23 files/325 pages<sup>2</sup>. Without waiving any rights or objections to the production or publication of the documents regarding the organ donation at bar, the undersigned represent to the Court that there are Sharing Hope privileged documents which do not appear in the Senate’s Appendix B. However, as of the filing of this Return, the undersigned Counsel are unaware of whether UNOS produced any of the other Sharing Hope documents/pages to the Senate committee, and it is unknown if, or when, the Senate might publicly publish more Sharing Hope documents in the future.

In addition to the Senate committee report, the Plaintiff/Respondent has presented certain documents to the Court as exhibits to her motion, including three newspaper articles [Exhibits A, B, & D] and the Senate memorandum referenced above. Sharing Hope submits that these matters are outside the Record on Appeal and/or irrelevant to the issue presented by the motion. To the

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<sup>1</sup> See Sharing Hope Fourth Amended Privilege Log (via email), April 13, 2021; ROA 573.

<sup>2</sup> Several pages within “Appendix B -ABO Incompatibility Case 2” are duplicates, some of the pages are not Sharing Hope documents, and at least one file out of the 23 appears to be unrelated involving a different Organ Procurement Organization.

extent that a government website and Senate memorandum, as public government documents, may establish the publication of certain documents submitted by UNOS, the Senate committee's report does not, and cannot, establish all the facts and circumstances that will be necessary to resolve issues of waiver generated by UNOS's production and the government's publication. Otherwise, Sharing Hope objects to the reliance on the Committee report/memorandum as some evidence or authority that there is no recognized privilege upon which UNOS (or Sharing Hope) could rely in response to the federal subpoena. The Senate report does not constitute controlling legal authority on the privilege issues before this Court which rest on state law.

As to the newspaper articles offered as some "proof" that the case underlying this appeal is a matter of significant state and national interest, Sharing Hope submits that this appeal presents an important, novel issue of state law. Otherwise, Sharing Hope objects to the sensationalist tenor of the articles. Whatever the motivation may be for the federal government's concern with UNOS, which has administered the OPTN since 1986, the legislative decision-making issues should and must be segregated from this civil action arising from this specific incident involving the handling and transmittal of donor information by this OPO.

Sharing Hope also maintains that the appended news reports do not establish the facts of the ABO blood testing gathered by Sharing Hope and the transmittal of those test results through OPTN channels. A jury will make the relevant findings of fact after presentation of all the evidence as properly admitted at a trial on the merits in the Charleston County Court of Common Pleas.

## ARGUMENT

### THE APPEAL FROM THE MOTION COMPELLING DISCLOSURE OF PEER REVIEW MATERIALS SHOULD NOT BE DISMISSED AS MOOT.

#### *Applicable Law on Mootness*

“An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). “A case becomes moot when” judgment, if rendered, will have no practical legal effect upon the existing controversy.” Sloan v. Greenville Cnty., 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009), *quoted in* S.C. Pub. Int. Found. V. S.C. Dep’t of Transportation, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017). There are three exceptions by which an appellate court still may choose to issue rulings despite mootness:

First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Curtis, 549 S.E.2d at 596 (citations omitted).

Notwithstanding that certain documents have been made public by a U.S. Senate committee, this appeal is not moot because an appellate court ruling on the existence and/or applicability of a peer review privilege still will have a practical legal effect on the existing controversy arising from Plaintiff’s motion to compel discovery. In addition, a ruling on the applicability of the privilege is a threshold question essential for the resolution of multiple issues that remain and/or will arise during the ongoing litigation up to and including trial. Even if, for the sake of argument, the peer review privilege might be considered moot as to some or all of these

particular documents, one or more exceptions should be applied to allow the Court to proceed with review of the important and novel legal issues presented in this appeal.

**I. The Court's decision on the existence of a peer review privilege still will have a practical legal effect on the existing controversy.**

Despite the fact that the Plaintiff has obtained some documents through the publication by the Senate committee, there still is a very real controversy about the existence and/or applicability of a peer review privilege. Upon review of the documents made public by the Senate committee in comparison with Sharing Hope's privilege log, it appears that there are documents to which Sharing Hope asserts the peer review privilege that have not been made public. Further, Sharing Hope is uncertain as to whether UNOS provided other privileged documents which have not been made public as of this time. Sharing Hope has inquired of UNOS and is waiting on UNOS to advise everything they produced. Thus, there still is an active controversy regarding those documents which have not been made public by the Senate committee and also regarding those document(s) which may not have been produced by UNOS to the Senate committee.

**II. The Court's decision on this novel legal issue will affect future rulings and have collateral consequences for the parties in the case at bar.**

The novel legal issue of whether the OPO's post-incident reviews, as part of the OPTN/UNOS self-critical quality assurance and peer review reevaluation and/or the Root Cause Analysis with the donor hospital, are protected by a peer review privilege will affect future events because these issues will arise at trial in the context of admissibility of peer review documents, including layers of issues on waiver, because Sharing Hope fervently maintains that neither UNOS's production nor the federal government's publication of certain documents constitute a valid, effective waiver of Sharing Hope's privilege.<sup>3</sup> Courts in some jurisdictions have held that a

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<sup>3</sup> Sharing Hope anticipates that the privilege issue also may arise in relation to evidentiary

peer review privilege is absolute and cannot be waived because the public policy interests are too important.<sup>4</sup> The South Carolina statutes on peer review privilege, §44-7-392 and §40-71-20, both authorize waiver – but any such waiver must be in writing.

Section 40-71-20(A) which addresses peer review privilege in the context of proceedings conducted by a committee of a professional society, provides that: “All proceedings of and all data and information acquired by the committee referred to in Section 40-71-10 in the exercise of its duties are confidential unless a respondent in the proceeding requests *in writing* that they be made public.” (Emphasis added.) Similarly, Section 44-7-392 provides that peer review materials/documents shared within a health care system remain confidential and are “not subject to discovery, subpoena, or introduction into evidence in any civil action unless the hospital and any affected person who is a party to such action waives the confidentiality *in writing*.” (Emphasis added.) In addition, § 44-7-392 provides that reports to DHEC or to the joint commission or other accrediting bodies “must not be considered a waiver of any privilege.”

These issues of waiver necessarily are predicated on the threshold issue of whether the documents are privileged because determining whether the documents are privileged is the first step before considering whether there has been a waiver. “We hold that the party asserting the privilege has the initial burden to make a prima facie showing that the communications in

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objections to any expert opinions that may be grounded upon privileged documents obtained without a valid waiver or legal process.

<sup>4</sup> For example, the Georgia legislature “placed an absolute embargo upon the discovery and use of all proceedings, records, findings and recommendations of peer review groups and medical review committees in civil litigation.” Emory Clinic v. Houston, 258 Ga. 434, 434–35, 369 S.E.2d 913, 913-14 (1988) (holding that “prior newspaper reports of medical peer review information cannot alter prohibition on discovery of peer review information in civil litigation”). *See also* Woods v. Moses Cone Health System, 198 N.C. App. 120, 678 S.E.2d 787 (2009) (holding a peer review privilege absolute and not waivable); Pinkard v. HCA Health Services of Tennessee, Inc., 545 S.W.3d 443 (Tenn. App. 2017) (peer review privilege cannot be waived).

question are privileged; if the initial burden is met, the party challenging the privilege must establish the communications are otherwise discoverable under an exception or waiver.” In re Mt. Hawley Ins. Co., 427 S.C. 159, 168–69, 829 S.E.2d 707, 713 (2019) (addressing attorney-client privilege). Sharing Hope maintains that it has not executed any written waiver of the confidentiality of its peer review documents. Sharing Hope further maintains that (1) it did not waive the privilege by sharing materials with UNOS, as the administrator of the OPTN and part of the Network’s peer review process, and (2) UNOS did not have the authority to waive the OPO’s privilege in producing the materials to the Senate committee.

By referencing these points of law regarding waiver, Sharing Hope does not intend to relieve the Plaintiff/Respondent of her burden of proving waiver. Nor does Sharing Hope intend this brief discussion to represent a comprehensive argument on why UNOS’s production and/or the Senate’s publication do not constitute any valid waiver of its privilege. Sharing Hope only intends to show that there are multiple legal and factual issues that would have to be resolved before Sharing Hope’s asserted peer review privilege(s) could be rejected as having been waived. Should this Court find it necessary or appropriate to consider the waiver issues, Sharing Hope would request permission to fully brief the issue. Ultimately, however, the predicate question of the existence and/or applicability of a peer review privilege pending before this Court should be answered before reaching any questions of waiver.

**III. The Court’s decision on this novel legal issue will affect future rulings and have collateral consequences for the parties in companion cases pending in state and federal court.**

Beyond the specific discovery order on appeal, resolution of the novel and important privilege issue is important to two other related actions arising from other organs donated by the same donor. [Ykeiah Lawrence , et al vs. We Are Sharing Hope SC, et al, 2021-CP-10-02033; Joe Patterson v. We Are Sharing Hope SC, et al, 2:21-cv-1242-BHH.]

In Lawrence, the plaintiff has not yet served any discovery requests on Sharing Hope so the privilege issue has not arisen, but there is a motion pending (filed by UNOS) seeking to combine the Lawrence and Holliman cases for discovery and trial, and both actions have been assigned to Judge Price. [Exhibit A; Motion, filed March 29, 2022. Exhibits B & C; Orders, filed May 9, 2022.] Thus, the Court’s decision in this appeal on the privilege will directly impact the Lawrence action, and a dispositive resolution of the legal issue in this pending appeal also will promote judicial economy in both cases.

The Court’s decision in this appeal also will directly impact the Patterson action pending in federal court because the district court, sitting within its diversity jurisdiction, has chosen to defer any decision on the peer review privilege issue raised in that case until this Court rules:

In light of the unique circumstances presented by the facts and procedural history of this case—in particular, that the Holliman appeal currently pending before the South Carolina Court of Appeals concerns the same documents and precise claims of privilege also asserted in this case—the Court declines to make a ruling at this time as to the applicability of the privilege asserted by Sharing Hope in this case. By virtue of its diversity jurisdiction, this Court is, in effect, sitting as another trial court of the State. See [*Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 108 (1945).] Just as the trial court in the Holliman case found it necessary to stay certain discovery pending resolution of this specific issue by the South Carolina Court of Appeals,<sup>5</sup> this Court also concludes that resolution of this state law issue is better left to the State appellate court before which the precise issue is currently pending

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<sup>5</sup> See Exhibit E; Judge Young’s Order staying discovery as it relates to privilege materials pending appeal, filed November 5, 2021.]

[See Exhibit D – Order of Magistrate Judge Molly H. Cherry, signed 8/23/22.] Under these circumstances, jurisprudence would be best served by a South Carolina appellate court providing a dispositive ruling on the novel issue of state law.

In various cases, the South Carolina Appellate Courts have addressed issues “for the benefit of the bench and the bar” in certain circumstances, such as where an issue might arise on remand at trial. State v. Bellamy, 293 S.C. 103, 106, 359 S.E.2d 63, 65 (1987), *overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (commenting, for the benefit of the bench and bar, on an issue that might arise during retrial). The Appellate Courts have likewise, ruled on unripe, moot, or unpreserved issues, where judicial economy would best be served by a final appellate disposition. *See also* Smith v. Tiffany, 419 S.C. 548, 559, 799 S.E.2d 479, 485 n.3 (2017) (taking the opportunity to address a claim that the trial court did not rule upon because the issue had generated considerable litigation -- “in the interest of judicial economy and for the benefit of the bench and bar”); Terry v. Terry, 400 S.C. 453, 456, 734 S.E.2d 646, 648 (2012) (taking the opportunity to clarify a point of law “for the benefit of the bench and bar”); Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 96, 668 S.E.2d 795, 797 (2008) (commenting on effect of change in law “for the benefit of the bench and bar”); Cothran v. Brown, 357 S.C. 210, 217, 592 S.E.2d 629, 632–33 (2004) (addressing an issue unnecessary for resolution of the appeal for “the benefit of the Bench and Bar”); Hooper v. Rockwell, 334 S.C. 281, 293, 513 S.E.2d 358, 365 (1999) (addressing an issue of first impression “for the benefit of the bench and bar”); State v. Meehan, 160 S.C. 111, 158 S.E. 151, 158 (1931) (discussing the need to provide clarity on a jury charge for a rare type of case “for the benefit of the bench and bar”); Keene v. CNA Holdings, LLC, 426 S.C. 357, 381, 827 S.E.2d 183, 196 (Ct. App. 2019), *aff’d*, 436 S.C. 1, 870 S.E.2d 156 (2021) (addressing an issue that had not been preserved for appeal for the benefit of the bench and

bar); Hannah v. United Refrigerated Servs., Inc., 312 S.C. 42, 46, 430 S.E.2d 539, 542 (Ct. App. 1993) (addressing an issue for the benefit of the bench and bar even though not necessary for disposition of the appeal). This case presents comparable circumstances to support the Court proceeding with this appeal to answer the important and novel question of law for the benefit of the trial judges and parties in the three related cases. Certainly, judicial economy also will best be served by dispositive answers at this stage before these three cases proceed with completing discovery and trials on the merits.

### **CONCLUSION**

Despite UNOS' production and the Senate's publication of certain privilege documents, the important and novel legal issue pending in this appeal still presents a very real and active controversy. The parties to this action need an answer to move forward with discovery and to trial on the merits. Likewise, the parties to the companion cases in state and federal court also need the answer. Both the bench and the bar will benefit from an answer and the interest of judicial economy would best be served by the Court proceeding with the appeal to provide a timely answer to the important and novel question of whether the post-incident self-critical materials prepared or exchanged by Sharing Hope pursuant to the federal OPTN requirement should be protected by a peer review privilege.

Wherefore, based on the foregoing, Sharing Hope respectfully submits that the Motion to Dismiss should be denied.

Respectfully submitted,

HOOD LAW FIRM, LLC

*/s/ Mary Agnes Hood Craig*

Mary Agnes Hood Craig (SC #6960)

Jean Marie Jennings (SC #100651)

172 Meeting Street ~ P.O. Box 1508

Charleston, South Carolina 29402

Phone: (843) 577-4435

Facsimile: (843) 722-1630

Info@hoodlaw.com

**September 14, 2022**

**Attorneys for Appellant  
We Are Sharing Hope SC**

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**Sep 14 2022**  
**SC Court of Appeals**

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Certificate of Service  
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The undersigned certifies that on this **14<sup>th</sup>** day of **September 2022**, a copy of the RETURN TO MOTION TO DISMISS on behalf of Appellant We Are Sharing Hope SC was served by emailing a copy of each, on the following counsel at the addresses listed below:

John C. Moylan, III, Esquire	<a href="mailto:jmoylan@wyche.com">jmoylan@wyche.com</a>
Mary Lucille Dinkins, Esquire	<a href="mailto:ldinkins@wyche.com">ldinkins@wyche.com</a>
James Hunter May, Esquire	<a href="mailto:jmay@wyche.com">jmay@wyche.com</a>
Lauren Spears Gresh, Esquire	<a href="mailto:lgresh@hallboothsmith.com">lgresh@hallboothsmith.com</a>
Rachel Lewis Anna, Esquire	<a href="mailto:ranna@wyche.com">ranna@wyche.com</a>
Hugh W. Buyck, Esquire	<a href="mailto:hwb@buyckfirm.com">hwb@buyckfirm.com</a>
G. Wade Cooper, Esquire	<a href="mailto:gwc@buyckfirm.com">gwc@buyckfirm.com</a>
Christine Kent Toporek, Esquire	<a href="mailto:christine.toporek@rogerstownsend.com">christine.toporek@rogerstownsend.com</a>
Christina Woodward Strong, Esquire	<a href="mailto:xtina@cwstronglaw.com">xtina@cwstronglaw.com</a>
Kelly M. Jolley, Esquire	<a href="mailto:kjolley@jolleylawgroup.com">kjolley@jolleylawgroup.com</a>
Ariail B. Kirk, Esquire	<a href="mailto:akirk@jolleylawgroup.com">akirk@jolleylawgroup.com</a>

**HOOD LAW FIRM, LLC**

/s/ Mary Agnes Hood Craig  
Mary Agnes Hood Craig (SC #6960)

September 14, 2022

**Via E-Filing**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Re: 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  
C/A No. 2020-CP-10-02902, Charleston CP  
Appellate Case No. 2021-000487  
HLF File No. 269.009

Dear Ms. Kitchings:

Enclosed please find the Return to Motion to Dismiss on behalf of Appellant We Are Sharing Hope SC in the above-referenced case. We are serving all counsel of record with a copy of the Return by email.

Kind regards,

Yours truly,

*/s/ Mary Agnes Hood Craig*

Mary Agnes Hood Craig

MHC/spc

Enclosures

cc w/ enclosure [***Via E-Mail***]:

John C. Moylan, III, Esquire/Mary Lucille Dinkins, Esquire/James Hunter May, Esquire  
Jack G. Gresh, Esquire/Lauren Spears Gresh, Esquire  
Rachel Lewis Anna, Esquire  
Hugh W. Buyck, Esquire/G. Wade Cooper, Esquire  
Christine Kent Toporek, Esquire  
Christina Woodward Strong, Esquire  
Kelly M. Jolley, Esquire/Ariail B. Kirk, Esquire

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