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Sep 26 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Debra R. McCaslin, Circuit Court Judge
Appellate Case No. 2021-000487

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.

**APPELLANT UNITED NETWORK FOR ORGAN SHARING’S RETURN TO
RESPONDENT’S MOTION TO DISMISS APPEAL FOR MOOTNESS**

This appeal presents novel issues that have far-reaching implications for the success of the national organ transplant program as a whole, as well as the success of the organ transplant program in South Carolina. Consequently, the American Medical Association and the South Carolina Medical Association filed a joint amicus brief. The Association of Organ Procurement Organizations, which represents 48 federally designated non-profit organ procurement organizations, also filed an amicus brief.

Respondent (Plaintiff) moves to dismiss this appeal as moot. Appellant We Are Sharing Hope SC (Sharing Hope) filed a return. Appellant United Network for Organ Sharing (UNOS) files this separate return. For the reasons set forth herein, UNOS submits that this Court should deny the motion to dismiss.

In the alternative, this Court should submit Plaintiff’s “Motion to Dismiss Appeal for Mootness” to the merits hearing panel of this Court for its consideration in conjunction with the merits of the appeal. This appeal is ready for consideration on the merits – it was on the preliminary list for the November 2022 term of this Court before Plaintiff filed the motion to dismiss. Any decision on the motion to dismiss requires consideration of several exceptions to the mootness doctrine, and this requires a full understanding of the merits of the issues in the underlying appeal. Rather than burden this Court’s motions panel with reviewing and digesting the eight (8) briefs and 589-page Record on Appeal filed in this case, the merits hearing panel should consider the motion in conjunction with the merits of the appeal.

BACKGROUND

This is a wrongful death action. Plaintiff alleges that her decedent received incompatible lungs in a double-lung transplant and died from the resulting “hyperacute rejection of [the] transplanted lungs due to ABO incompatibility of the lungs,” *i.e.*, the decedent had Type O blood, and the transplanted lungs were Type A but had been misidentified as Type O. (Complaint at R-1 65-79). Plaintiff sued the Medical University of South Carolina (MUSC), Sharing Hope, and UNOS. (*Id.*). Plaintiff contended that each defendant had been negligent in their respective roles in the decedent receiving the incompatible lungs. (*Id.*) Sharing Hope identified and procured the lungs for transplantation and coordinated the delivery of the lungs to MUSC. UNOS identified the potential recipients (including Plaintiff’s decedent) using computer systems that applied a national organ allocation algorithm. MUSC performed the lung transplant procedure.

Plaintiff served discovery requests for information related to the Decedent, his death, and the donor of the transplanted lungs. (See generally R-1 at 163-178, 288-295; R-2 at 323-330, 358-367, 429-436). Each defendant responded in part by claiming a peer review privilege for limited

portions of that information arising from quality and performance improvement processes. UNOS serves as the national Organ Procurement and Transplantation Network (OPTN), and is required to maintain a peer review process to assist OPTN members with quality improvement and patient safety activities. Both MUSC and Sharing Hope are OPTN members and participated in the OPTN peer review process. Plaintiff moved to compel MUSC and Sharing Hope to produce the privileged information. (Id.). Some of Sharing Hope's privileged documents were also the subject of UNOS's separate peer review privilege claim. Thus, UNOS filed a memorandum in support of Sharing Hope's privilege claim and a motion for a protective order as to those common documents.

The trial court held that all of MUSC's privilege log documents were protected by a peer review privilege pursuant to S.C. Code § 44-37-394(A), the statute that authorizes enforcement of the privileges and confidentiality imposed by S.C. Code § 44-37-392. (R-2 at 560-561). MUSC's privilege log included more than 200 pages from a review of MUSC's lung transplant program conducted by UNOS at MUSC's request. (R-2 at 560). In a separate order, which is the subject of the instant appeal (R-1 at 8-16), the trial court ordered that "Plaintiff's Motion to Compel is hereby granted, Defendants (sic) collective Motions for Protective Orders submitted in opposition are hereby DENIED, and Defendant We Are Sharing Hope shall produce the documents described herein" (R-1 at 16). The trial court did not order UNOS to produce any documents, but it effectively ordered the production of some documents within UNOS's claim of a peer review privilege, because the court denied UNOS's motion for a protective order and compelled Sharing Hope to produce documents for which UNOS also claimed a peer review privilege.

Recently, the United States Senate Finance Committee subpoenaed documents from UNOS as part of the Senate's oversight of the national organ transplant system managed by UNOS under contract with the federal government. The Senate published some but not all of those

documents, including approximately 325 pages of documents related to the present case. Sharing Hope notes that those published documents do not include all documents for which it claims a privilege. In like manner, those published documents do not include all documents claimed as privileged in UNOS's privilege log. (See R-2 at 351-354, 2,000 pages of privileged documents).

ARGUMENT

I. The appeal is not moot.

As argued by Sharing Hope and joined by UNOS, the Senate Finance Committee's publication of some documents related to this case does not moot this appeal, because those documents do not include all documents and information claimed to be protected by peer review. Thus, the appellate issues remain in controversy and ripe for decision by this Court.

Moreover, the only thing conceivably mooted by the publication of some of the privileged documents is the confidentiality aspect of the peer review privilege. This does not and cannot moot the prohibition against using peer review privileged information as evidence in a lawsuit. Moreover, it does not and cannot moot the questions of whether the peer review privilege exists and, if not, whether this Court should extend statutory peer review privileges to South Carolina's organ transplant system or recognize a common law peer review privilege. Thus, the appellate issues remain in controversy and ripe for decision by this Court.

II. Assuming any mootness, the appeal should continue under one or more exceptions to the mootness doctrine.

Assuming any mootness here, as argued by Sharing Hope and joined by UNOS, there are exceptions to the mootness doctrine that apply here and warrant this Court's review of the issues presented in this appeal.

III. The issue of mootness should be submitted to the merits hearing panel of this Court.

Post-incident investigations and candid self-critical inquiry are essential to the future safety and improvement of any medical service, including the organ transplant system. The absence of a privilege for this peer review will chill participation in the review to the detriment of future organ transplant patients. This appeal presents numerous novel questions of South Carolina law about the existence and extent of a peer review privilege for South Carolina's organ transplant system. These novel issues also form the core of the inquiry as to whether any exceptions to the mootness doctrine apply here.

Any decision on the motion to dismiss requires a full understanding of the merits of the novel issues present by the parties and the amici, because those issues are inextricably intertwined with the question of mootness and the exceptions to mootness. This appeal is ready for consideration by this Court's merits hearing panel – it was on the preliminary list for the November 2022 term before Plaintiff filed the instant motion to dismiss. Under these circumstances, the question of mootness should be submitted to the merits hearing panel for its consideration in conjunction with the merits of the appeal rather than requiring the motions panel to review and digest the eight (8) briefs and 589-page Record on Appeal in this case.

CONCLUSION

The motion to dismiss should be denied. In the alternative, the motion should be submitted to the merits hearing panel for its consideration in conjunction with the merits, which include novel issues that have far-reaching implications for the national organ transplant program generally, and the organ transplant program in South Carolina specifically.

Respectfully Submitted,

s/Robert L. Widener

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Columbia, SC
September 26, 2022

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Darla Welker,..... Defendants,

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United Network for Organ Sharing are the..... Appellants.

PROOF OF SERVICE

I, Ann Shuler, an employee of Burr & Forman LLP, certify that, on this 26th day of September, 2022, a copy of *Appellant United Network for Organ Sharing's Return to Motion to Dismiss* was served upon all counsel of record in the above-captioned matter via email at the email addresses listed below:

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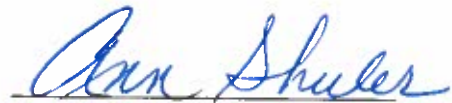
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September 26, 2022

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Honorable Jenny Abbott Kitchings
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RECEIVED
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SC Court of Appeals

**Re: Michelle Holliman v. We Are Sharing Hope SC
Appellate Case No. 2021-000487**

Dear Ms. Kitchings:

Attached for filing in the above referenced Appellate case, please find the *Appellant United Network for Organ Sharing's Return to Respondent's Motion to Dismiss*, along with the Certificate of Service. By copy of this letter, we are serving all counsel of record via email.

Thank you for your assistance in this matter.

Sincerely,

Burr & Forman LLP



Robert L. Widener

RLW/as

Attachments

cc: Lauren Spears Gresh, Esquire
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