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Nov 21 2022

SC Court of Appeals

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.

RESPONDENT'S MEMORANDUM IN RESPONSE TO COURT'S INQUIRY

WYCHE, P.A.

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The Plaintiff-Respondent, Allen Holliman, submits this memorandum in response to this Court's letter dated November 17, 2022. As this Court knows, Mr. Holliman was killed when he was transplanted with lungs of the wrong blood type. Mr. Holliman acknowledges that the documents that have been made public after the filing of this appeal satisfy his need for the documents improperly withheld by the Appellants.

More than 18 months ago, Judge Debra McCaslin ordered the Defendants-Appellants to produce documents that they had wrongfully withheld pursuant to a claim of peer-review privilege "within seven (7) days of this Court's Order." (Order at p. 7) Rather than comply with the Court's Order, the Appellants filed an improper interlocutory appeal with this Court, seeking review of the Circuit Court's discovery order.

No one should be given an organ transplant of the wrong blood type. This simple fact has led national media outlets and the United States Senate to delve into the critical implications that this case has for public health. As a result of that scrutiny, many, if not all, of the documents withheld as privileged have now been publicly released and widely disseminated after the filing of this appeal.¹

First, the United States Senate Finance Committee has posted to its public website many, if not all, of the documents at the heart of this appeal. See <https://www.finance.senate.gov/hearings/a-system-in-need-of-repair-addressing-organizational-failures-of-the-uss-organ-procurement-and-transplantation-network> ("A System in Need of Repair: Addressing

¹ Mr. Holliman does not know whether or not the Appellants may be withholding additional documents because those materials have never been produced. Mr. Holliman acknowledges, however, that documents made public by the Senate Finance Committee and produced by CMS pursuant to the Freedom of Information Act alleviate the need for the Appellants to produce additional documents.

Organization Failures of the U.S.’s Organ Procurement and Transplantation Network.”). Currently posted to the Senate’s website are hundreds of documents that come specifically from the case at hand and that discuss the errors made by the Appellants that led to Mr. Holliman’s death.

In addition to the documents published online by the Senate, the Centers for Medicare & Medicaid Services (CMS) have provided, pursuant to the Freedom of Information Act (FOIA), additional hundreds of documents related to its investigation of this case that Appellants also withheld as privileged. In response to a subpoena issued by Mr. Holliman to CMS for a copy of its investigative file into this case, CMS exercised its discretion not to comply with the subpoena and instead provided documents that it deemed publicly available through the Freedom of Information Act: “[W]e treat a subpoena for documents as a Freedom of Information Act (FOIA) request. *See* 45 C.F.R. § 2.5. Therefore, we have forwarded the document request to the CMS FOIA office for further action. . . . I also note that WASH has objected to the subpoenas. The objection does not affect my review of the testimony request, because I conduct that review pursuant to 45 C.F.R. § 2.4(a) [FOIA].” (October 18, 2021, correspondence from CMS attached as Exhibit A). These documents, now released by CMS under FOIA, constitute another large batch of documents wrongly withheld by the Appellants.

CONCLUSION

As Judge McCaslin’s Order and Mr. Holliman’s briefs to this Court explain, Appellants have wrongfully withheld documents in discovery because there is no applicable peer-review privilege, and Appellants have filed an improper interlocutory appeal of a circuit court’s discovery order. Notwithstanding those issues, Mr. Holliman acknowledges that documents released to the public by the United States Senate and produced by CMS under FOIA satisfy his need for the documents improperly withheld by the Appellants. Documents that are publicly available and

widely disseminated are not privileged and no longer need to be produced to Mr. Holliman by Appellants. Accordingly, the public releases have rendered this appeal moot.

Respectfully submitted,

WYCHE, P.A.

s/John C. Moylan

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Attorneys for Plaintiff

November 21, 2022

EXHIBIT A

October 18, 2021

VIA E-mail to ldinkins@wyche.com and jmoylan@wyche.com

Lucy Dinkins, Esq.
John C. Moylan, III, Esq.
Wyche, P.A.
807 Gervais Street, Suite 301
Columbia, South Carolina 29201

RE: *Holliman v. We Are Sharing Hope SC, et al.* (State Ct., Charleston Cty., S. Carolina) – Subpoena for Survey File and Surveyor Deposition Testimony

Dear Counsel:

I am in receipt of the subpoenas you submitted seeking both documents and testimony in the subject litigation regarding a 2019 complaint survey at We Are Sharing Hope SC (WASH). Specifically, you seek the Centers for Medicare & Medicaid Services' (CMS') "investigative file" and deposition testimony from CMS surveyor Kathy Brazil, R.N. The U.S. Department of Health and Human Services' (DHHS') regulations located at 45 C.F.R. Part 2 (*Touhy* regulations) cover requests for documents and testimony in matters where the government is not a party, like in the subject case.¹

Your document request is for CMS' "investigative file." Yet you also note that you have already received documents from CMS regarding WASH and you include at least some of those documents with the current request. Note that when a court lacks jurisdiction over DHHS, like in the subject case, we treat a subpoena for documents as a Freedom of Information Act (FOIA) request. *See* 45 C.F.R. § 2.5. Therefore, we have forwarded the document request to the CMS FOIA office for further action.

DHHS' *Touhy* regulations prohibit employees from providing testimony concerning information acquired in the course of performing official duties unless the Agency head determines that

¹I note two submissions from your firm. Your first submission, with cover letter dated September 27, 2021 and addressed to Surveyor Brazil in the CMS Atlanta regional office, includes subpoenas dated September 29. The copy I received indicates it was also sent to Chiquita Brooks-LaSure, CMS Administrator. Your submission dated October 7, 2021 was addressed to DHHS Secretary Xavier Becerra and Admin. Brooks-LaSure, and includes the same subpoenas, a discussion of the *Touhy* regulations and other attachments. Note that any such subpoenas should be sent according to 45 C.F.R. § 4.2. Further, I also note WASH has objected to the subpoenas. The objection does not affect my review of the testimony request, because I conduct that review pursuant to 45 C.F.R. § 2.4(a).

compliance with the request would promote the objectives of DHHS. 45 C.F.R. § 2.3. I am the Agency head in this situation. Requests for testimony should state: 1) the nature of the requested testimony; 2) why the information sought is otherwise unavailable; and 3) the reasons why the testimony would be in the interests of DHHS or the federal government. 45 C.F.R. § 2.4(a). I have reviewed your request with these criteria in mind and have determined that CMS will not allow Ms. Brazil to testify in this litigation, both because the information you seek is available otherwise and the testimony is not in the interests of either DHHS or the federal government.

Your request for testimony asks that: “Ms. Brazil testify as to her background, to the fact that she conducted an unannounced complaint survey into the circumstances surrounding the erroneous ABO blood typing that led to Mr. Holliman’s death, that the documents produced are from her investigative file, and to facts that she may recall from that investigation.” The underlying matter certainly involves very serious – even tragic – issues. As you are aware from the documents you have obtained, Surveyor Brazil’s investigation in May of 2019 revealed that WASH was out of compliance with federal requirements for organ procurement organizations. Your request included roughly 300 pages of attachments – documents you state you that have already obtained from CMS. The attachments include the Statement of Deficiencies (SOD) and surveyor notes. The SOD will contain all of the relevant allegations of noncompliance regarding WASH. The SOD is the official record of the survey findings and reflects contemporaneous factual observations, including statements made during interviews, of a surveyor or survey team. The SOD is completed in the normal course of government business by and for an agency that is dedicated in part to investigating Medicare noncompliance. Therefore, the SOD paints the most complete picture of what Surveyor Brazil observed and documented during the investigation.

Ms. Brazil’s testimony would refer you to the SOD. As a result, the crux of her testimony is available by other means – namely, through the SOD and other documentation you have already obtained from CMS.

Further, allowing Ms. Brazil to testify in this matter, in which the government is not a party, is not in the interests of either DHHS specifically or the federal government generally. CMS already conducted its investigation. Additionally, as the coronavirus pandemic continues, survey personnel continue to be stretched thinly. Taking surveyors away from their core duties to testify places residents at many types of facilities that those surveyors inspect at added risk.

Therefore, based on the foregoing, I am denying your request for testimony from Ms. Brazil. CMS’ FOIA office will contact you regarding your document request. If you have questions, you may contact Michelle Gilliam in the DHHS Office of the General Counsel at michelle.gilliam@hhs.gov or (404) 562-3389.

Ms. Dinkins
October 18, 2021
Page 3 of 3

Sincerely,

A handwritten signature in black ink, appearing to read "Lee L. Fleisher". The signature is fluid and cursive, with a long horizontal stroke at the end.

Lee Fleisher, M.D.
Chief Medical Officer and Director
Center for Clinical Standards and Quality
Centers for Medicare & Medicaid Services

Cc: Michelle Gilliam, OGC, Region IV
FOIA Group, CMS, Region IV

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Michelle Cha Holliman, individually, and as Personal Representative of
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Defendants,

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Appellants.

PROOF OF SERVICE

This is to certify that I have this date caused to be served a true and correct copy of the foregoing **Respondent's Memorandum in Response to Court's Inquiry** on counsel in this action by email, pursuant to the Supreme Court's Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules dated May 6, 2022, by electronic mail, addressed as follows:

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s/John C. Moylan, III

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November 21, 2022

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Via E-Filing

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: Michelle Cha Holliman, individually and as personal representative of the estate of Allen B. Holliman v. We Are Sharing Hope SC, Medical University of South Carolina, United Network for Organ Sharing, Jacqueline Honig, M.D., and Darla Welker
C/A No. 2020-CP-10-02902, Charleston CP
Appellate Case No. 2021-000487

Dear Ms. Kitchings:

Enclosed for filing with your office, please find the Respondent's Memorandum in Response to Court's Inquiry, Proof of Service and Exhibit A.

All counsel of record are being served with same via electronic mail.

Sincerely,

s/John. C. Moylan, III

John C. Moylan, III
jmoylan@wyche.com

Enclosure

cc via email:

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Jean Marie Jennings, Esquire
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