

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

RECEIVED

Nov 23 2022

SC Court of Appeals

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.

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

Currently, pending before the Court is a motion filed by the Plaintiff/Respondent seeking dismissal of this appeal as moot. By letter of November 17, 2022, the Court directed the Plaintiff/Respondent to answer a specific question: “[T]he Court requests that you provide a memorandum on whether all of the 335 pages of documents Appellants claim to be peer-reviewed privileged have now been publicly released by the United States Senate Finance Committee or otherwise publicly reported.”

Appellant We Are Sharing Hope SC respectfully submits that the Plaintiff did not answer the Court's question in her response submitted November 21, 2022. As Sharing Hope has affirmatively stated, the privilege log references documents totaling 335 pages. Sharing Hope further represents the answer to the Court's question is "no" -- that not all of those 335 pages have been disclosed and/or published, and thus, the appeal should not be dismissed as moot because there still is an active case or controversy on the privilege issues. If the Plaintiff is "satisfied" with what documents she has obtained through the Senate's public disclosures, as she represents in her response, then Sharing Hope submits that it is Plaintiff's motion to compel that is moot and it is incumbent on her to withdraw her motion and allow the trial court's order to be vacated.

The significance of the procedural posture on this mootness issue lies in the prospect that there are multiple layers of legal issues which still remain to be resolved and they all hinge on the predicate question of whether the documents created through Sharing Hope's participation in the mandatory self-critical quality assurance and peer-review evaluations as well as the Root Cause Analysis with the donor hospital are protected by peer review privilege. As more fully explained in this Appellant's return to the motion to dismiss, the novel legal issue as to whether the self-critical/root cause analysis privileges apply to Sharing Hope needs to be resolved for several reasons.

For example, the privilege questions undoubtedly will arise at trial in regards to the admissibility of the documents and/or expert opinions that rely upon the privileged materials. Neither UNOS's disclosure nor the Senate's publication negate/moot the privilege questions because Sharing Hope will challenge the legal efficacy of the alleged "waiver," and concomitantly, the waiver questions will rest on the predicate issues of the existence of peer review privileges in the first instance. If Sharing Hope were to withdraw its appeal or if the Court dismisses the appeal

as moot, then it is conceivable that Plaintiff might attempt to argue that Judge McCaslin's ruling could not be overruled by another circuit judge as this case proceeds through trial and that her ruling would govern any and all future privilege and/or waiver issues as law of the case. From any perspective, the novel, legal privilege issues will reoccur throughout the litigation and trial of this case as well as the other related pending cases. In particular, as noted in our Return, the Federal Court is waiting on a South Carolina appellate court to decide the novel legal issue of South Carolina law.

The privilege issues have been fully briefed, including amici briefs from the American Medical Association and S.C. Medical Association, and the Association of Organ Procurement Organizations. In addition, other courts are waiting on answers to the privilege issues. For all these reasons, Appellant We Are Sharing Hope SC respectfully submits that the Court should deny the motion to dismiss and proceed to oral argument and decision on the merits of the legal issues presented in this appeal.

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

November 23, 2022

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

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 23rd day of November 2022, a copy of the **SURREPLY TO MOTION TO DISMISS On behalf of Appellant We Are Sharing Hope SC** 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	jmoylan@wyche.com
Mary Lucille Dinkins, Esquire	ldinkins@wyche.com
James Hunter May, Esquire	jmay@wyche.com
Lauren Spears Gresh, Esquire	lgresh@hallboothsmith.com
Rachel Lewis Anna, Esquire	ranna@wyche.com
Hugh W. Buyck, Esquire	hwb@buyckfirm.com
G. Wade Cooper, Esquire	gwc@buyckfirm.com
Christine Kent Toporek, Esquire	christine.toporek@rogerstownsends.com
Christina Woodward Strong, Esquire	xtina@cwstronglaw.com
Kelly M. Jolley, Esquire	kjolley@jolleylawgroup.com
Ariail B. Kirk, Esquire	akirk@jolleylawgroup.com

HOOD LAW FIRM, LLC

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

November 23, 2022

Via E-Filing and US Mail

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

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Nov 23 2022
SC Court of Appeals

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:

The Plaintiff/Respondent filed a motion to dismiss this pending appeal as moot to which Appellant We Are Sharing Hope SC timely filed a return. Although the Plaintiff/Respondent did not file a reply, this Court directed the Plaintiff/Respondent to answer a specific question: “[T]he Court requests that you provide a memorandum on whether all of the 335 pages of documents Appellants claim to be peer-reviewed privileged have now been publicly released by the United States Senate Finance Committee or otherwise publicly reported.” The Plaintiff/Respondent submitted a memorandum on November 21, 2022, responding to the Court’s inquiry.

Although Rule 240, SCACR, does not provide for submission of a surreply, Sharing Hope moves for leave to submit the attached memorandum to offer clarification and emphasize the implications of the Plaintiff/Respondent’s current position that she is satisfied with documents she has accessed through the Senate’s publication of the documents produced by UNOS in the Congressional matter. Sharing Hope maintains that Plaintiff should withdraw her motion to compel if she does not wish to pursue discovery of the privileged documents that were not produced to and published by the Senate; otherwise, the privilege issues are not moot.

We are submitting a \$50.00 check for the motion filing fee by U.S. Mail this same day. If the Court requires a formal motion, please advise. Meanwhile, we are serving all Counsel of Record by email in accordance with Rule 262, SCACR, and the Supreme Court’s order of May 6, 2022.

HOOD LAW FIRM, LLC

The Honorable Jenny Abbott Kitchings
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November 23, 2022

Kind regards,

Yours truly,

/s/ Mary Agnes Hood Craig

Mary Agnes Hood Craig

MHC/mde

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