

Oct 23 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Civil Case No. 2020-CP-10-02902
Court of Appeal No. 2021-000487
Op. No. 2023-UP-205, filed May 24, 2023

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,
and 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

Appellants,

And of which We Are Sharing Hope SC is

Petitioner.

**COMMON LAW PETITION FOR WRIT OF CERTIORARI,
IN THE ALTERNATIVE TO, RULE 242, SCACR, PETITION FOR A WRIT OF CERTIORARI
TO REVIEW THE DECISION OF COURT OF APPEALS**

We Are Sharing Hope SC has submitted a petition pursuant to Rule 242, SCACR, seeking a writ of certiorari to review a final decision of the Court of Appeals dismissing the appeal from an Order Regarding Discovery issued by the Honorable Debra R. McCaslin which compels production of and discovery responses as to documents/materials which Sharing Hope claims are

protected by a peer review privilege.¹ By this separate filing, We Are Sharing Hope SC is also renewing its Petition for Extraordinary Relief by a Writ of Certiorari previously filed pursuant to S.C. Const. art. V, §5 and S.C. Code Ann. §14-3-310, seeking a common law writ of certiorari to review the same order. [S.C. App. No. 2021-001213/001215.]

By these Petitions, Sharing Hope is seeking the Supreme Court's review of the novel and important issues of peer review privilege that would become moot if Sharing Hope is forced to produce documents and answer deposition questions about matters involving the peer review process it participated in as required by its federal certification as an Organ Procurement Organization within the federal Organ Procurement and Transplant Network administered by UNOS.

In support of this Petition, the Appellant Sharing Hope craves the Court's reference to filings in the Court of Appeals² and certain other documents filed in this case and other related court cases which are submitted herewith.

Questions Presented for Review

The important and novel substantive questions regarding the OPO's asserted peer review privileges as presented by this appeal from the discovery order include:

¹ Per Rule 242, Counsel certifies that the Court of Appeals issued its order on filed May 24, 2023, dismissing the appeal as interlocutory. Sharing Hope timely filed a Petition for Rehearing on June 7, 2023, which was ruled upon and denied by the Court of Appeals Order, filed September 21, 2023.

² By order dated August 25, 2021, the Supreme Court suspended the requirement that petitioner file two copies of the Appendix, and provides that the necessary documents will be obtained from the electronic records of the case before the Court of Appeals. However, an abbreviated Appendix is submitted herewith in support the common law petition to provide other filings which demonstrate the compelling need for an answer to the novel and important question of state law on the privilege issue(s).

- I. Should post-incident self-critical materials prepared or exchanged by an Organ Procurement Organization pursuant to a requirement of its membership in the federal Organ Procurement and Transplant Network and its HHS federal certification and designation be protected by a peer review privilege?
- II. Does the peer review privilege found in S.C. Code § 44-7-392 apply to a root cause analysis conducted between the Organ Procurement Organization and the donor hospital?

The threshold appellate jurisdiction questions presented include:

- I. Whether the immediate appeal of this discovery order denying Sharing Hope's assertion of peer review privileges and compelling production is statutorily authorized by S.C. Code §44-7-394?
- II. Whether the Appellate Court can, and should, exercise pendant appellate jurisdiction over the interconnected issues relating to the peer review privilege as asserted by Sharing Hope?
- III. Whether the Supreme Court should grant extraordinary relief to review the discovery order because if Sharing Hope is compelled to produce its peer review documents and allow its employees to testify about the mandatory per review process conducted after the death of Plaintiff's decedent, there is no adequate remedy that could restore the privilege protection on appeal from a judgment after a trial on the merits?

Statement of the Case

A more complete factual background and procedural history can be found in the Appellant's Final Brief which was previously served and filed in the Court of Appeals. For the purposes of this Petition, Sharing Hope offers this more concise summary to identify the novel and important core legal issues which need review by this Court whether by appeal or by way of a writ of certiorari for extraordinary review.

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 the Medical University of South Carolina where the transplant surgery was performed, and claims against the United Network for Organ Sharing (UNOS) and We Are Sharing Hope SC (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 United States' Organ Procurement and Transplant Network (OPTN). [ROA 65; Complaint.]

The OPTN is the network established by federal statute and regulation responsible for the facilitation of organ recovery and transplantation throughout the United States. It is operated by UNOS, who oversees and coordinates its various member transplant hospitals and Organ Procurement Organizations (OPOs). Sharing Hope is the designated OPO for organ recovery services in South Carolina, and it provides organ and tissue donor services to numerous hospitals throughout South Carolina, including MUSC.

Federal regulation specifically requires the OPTN to establish appropriate peer review processes for the purpose of evaluating its members' compliance with applicable federal regulations and OPTN policies, including member OPOs. 42 C.F.R. § 121.10. In furtherance of this obligation, UNOS created a Membership and Professional Standards Committee (MPSC) which maintains membership criteria and monitors member compliance based on OPTN membership criteria, bylaws, and policies.³ In addition, the OPTN Bylaws include provisions for Medical Peer Review and promise confidentiality to promote quality improvement and full disclosure by OPTN members. Bylaws L.3, Medical Peer Review.⁴

³ See generally <https://optn.transplant.hrsa.gov/members/committees/membership-and-professional-standards-committee/>.

⁴ https://optn.transplant.hrsa.gov/media/1201/optn_bylaws.pdf.

As the certified OPO for South Carolina, Sharing Hope was bound to participate in medical peer review in connection with the donation case at issue. Accordingly, Sharing Hope and the UNOS MPSC engaged in a retrospective, self-critical quality assurance and peer review evaluation regarding the Recipient's double lung transplant following his death. Sharing Hope also engaged in a root cause analysis⁵ with the donor hospital, Grand Strand Medical Center, which was conducted to study the Recipient's death in order to identify the root causes towards a goal of improving patient safety protocols.

During the discovery process, Sharing Hope prepared a privilege log listing certain documents created during the mandatory post-incident peer review process. Also, during the discovery process, an employee/agent of Sharing Hope asserted a peer review privilege to questions posed during her deposition. The Plaintiff/Respondent filed a motion to compel and Sharing Hope filed a corresponding motion for a protective order presenting issues as to whether a peer review privilege protected the documents and inquiry into the details of the peer review process.

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. After a hearing and briefing, the Trial Court (Judge McCaslin) refused to recognize or

⁵ JCAHO accredited organizations use a comprehensive systematic analysis referred to as root cause analysis to study sentinel events of patient harm in order uncover the factors that lead to patient safety events and improve patient safety by preventing future harm. JACHO Root Cause Analysis in Health Care: Tools and Techniques, <https://www.jcrinc.com/-/media>. See also <https://www.med.unc.edu/ihqi/resources/root-cause-analysis>.

apply any peer review privilege to Sharing Hope, and granted Plaintiff's the motion to compel while denying the motion for a protective order. [ROA 10.]

Sharing Hope served and filed a notice of appeal on May 5, 2021, pursuant to Rule 203, SCACR, and S.C. Code §44-7-394 which provides:

(C) If the court orders a hospital or affected person to produce documents to a third party under this section, the hospital or affected person shall have the right to immediately appeal that order, and the filing of the appeal shall stay the enforcement of the order compelling the production.

[ROA 542.] In due course, the Appellant timely filed an initial brief with designations of matters to be included in the Record on Appeal. In its notice of appeal and brief, the Appellant specifically referenced the issue of appellate jurisdiction over this discovery order by referencing the appellate jurisdictional provisions of S.C. Code §44-7-394. [ROA 542; Brief pp. 5-6 n. 4.]

In her brief, the Respondent raised an issue of appellate jurisdiction, arguing that the order is an interlocutory decision that is not appealable at this time, citing a litany of cases which hold that discovery orders are not immediately appealable. The Respondent further contended that the statutory provision for an immediate appeal found in §44-7-394 does not apply because Sharing Hope is not a hospital, a hospital parent, a hospital subsidiary, a health care system, a hospital committee, a hospital's governing body, or a physician practice entitled to a peer review privilege under §44-7-392.

Sharing Hope maintains that appellate jurisdiction is properly founded under §44-7-392, and presented its arguments with citations to applicable caselaw in its reply. [Reply brief, pp. 1-4.] Without hearing oral argument, the Court of Appeals issued its order on filed May 24, 2023, dismissing the appeal as interlocutory. [Op. No. 2023-UP-205.] Sharing Hope timely filed a Petition for Rehearing on June 7, 2023, which was denied by Order, filed September 21, 2023.

In addition to pursuing the appeal, Sharing Hope also previously submitted a Petition for

Extraordinary Relief by a Writ of Certiorari seeking the Supreme Court’s review of these novel and important issues of peer review privilege that would become moot if Sharing Hope is forced to produce documents and answer deposition questions about matters involving the peer review process it participated in as required by its federal certification and contract with UNOS.⁶ [Sup. Ct. Appeal No. 2023-001213 and 2023-001215; filed October 25, 2021.] If the appeal is determined to be premature, as held by the Court of Appeals, Sharing Hope again seeks appellate review by way of a common law petition for extraordinary relief because if it is compelled to produce its peer review documents and allow its employees to testify about the mandatory peer review process conducted after the death of Plaintiff’s decedent, there is no adequate remedy that could restore the privilege protection on appeal from a judgment after a trial on the merits.

ARGUMENT

I. RULE 242 PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DISMISSAL BY THE COURT OF APPEALS – THIS APPEAL RAISES NOVEL QUESTIONS OF LAW THAT PRESENT SPECIAL AND IMPORTANT REASONS TO REVIEW THE ORDER OF THE COURT OF APPEALS DISMISSING THIS APPEAL.

Pursuant to Rule 242, SCACR, a writ of certiorari may be granted where there are special and important reasons such as where there are novel questions of law. This appeal presents several novel questions of law involving peer review privileges which constitute special and important reasons to grant a writ of certiorari to review the order of the Court of Appeals dismissing this appeal.

There are substantive issues presented regarding whether an OPO is entitled to assert a peer review privilege under § 44-7-392 and/or common law, namely:

- Should post-incident self-critical materials prepared or exchanged by an Organ

⁶ Sharing Hope also moved pursuant to Rule 204, SCACR, asking the Court to certify the pending appeal for review by this Court before it was determined by the Court of Appeals, which was denied.

Procurement Organization pursuant to a requirement of its membership in the federal Organ Procurement and Transplant Network and its HHS federal certification and designation be protected by a peer review privilege? and;

- Does the peer review privilege found in S.C. Code § 44-7-392 apply to a root cause analysis conducted between the Organ Procurement Organization and the donor hospital?

The question of 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 is a novel and important question of law. Research of South Carolina caselaw has not revealed any appellate opinion involving assertion of a peer review privilege by an Organ Procurement Organization, and there is no published caselaw in South Carolina interpreting or applying § 44-7-392.⁷ A wider search of other jurisdictions reveals a dearth of law on the question of whether a federally-certified OPO (or the OPTN/UNOS) can assert a peer review privilege to questions and/or document requests arising from the peer review process mandated by the UNOS-OPO regulatory and contractual requirements. However, the public policy foundation for peer review privilege in the healthcare field is well established in South Carolina law and in other jurisdictions.

Since the Court of Appeals dismissed the appeal without addressing the substantive privilege issues, the threshold issue of appellate jurisdiction is whether the discovery order rejecting the assertion of the privileges and compelling production is immediately appealable under S.C. Code §44-7-394. However, by finding that §44-7-394 does not apply, the Court of Appeals appears to have made a ruling on the substantive issue of whether Sharing Hope, as an OPO, is entitled to assert a peer review privilege under §44-7-392. Sharing Hope submits that the

⁷ The Court of Appeals issued an unpublished opinion in Hum. v. AnMed Health, No. 2021-000834, 2022 WL 10862726 (S.C. Ct. App. Oct. 19, 2022) which references §44-7-392. However, pursuant to Rule 268, SCACR, the opinion has no precedential value. Moreover, the opinion does not offer any ruling relevant to the unique privilege issues posed in this case in the context of the OPO's existence and relationship with UNOS under the federal regulatory schema.

Court of Appeals erred in dismissing the appeal and petitions this Court to issue a writ of certiorari to review to reinstate the appeal and consider the merits of the novel and important issues.

A. The immediate appeal of this discovery order is statutorily authorized by S.C. Code §44-7-394.

As a general rule, a discovery order is not immediately appealable. Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 692 S.E.2d 526, 529 n. 2 (2010). Prior to 2012, the Court had specifically ruled that an order involving a peer review privilege (under S.C. Code § 40-71-20) was not immediately appealable. Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 381 S.C. 332, 332–33, 673 S.E.2d 417, 418 (2009)⁸. However, in 2012, the Legislature addressed the issue of privilege for documents, records, and information in connection with hospital-related peer review processes aimed at assessing patient quality of care, including sentinel event investigations or root cause analyses. S. C. Code § 44-7-392; 2012 Act No. 275, § 1, eff June 26, 2012. With that 2012 Act, the Legislature also provided a motion procedure for parties to assert or contest the privilege and in camera review by the trial court. S.C. Code §44-7-394. Most significantly, §44-7-394 provides for immediate appeal of a trial court order compelling production:

(C) If the court orders a hospital or affected person to produce documents to a third party under this section, the hospital or affected person shall have the right to immediately appeal that order, and the filing of the appeal shall stay the enforcement of the order compelling the production.

“*Absent some specialized statute*, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable

⁸ As discussed below, notwithstanding the rule as stated in Wieters, the Supreme Court had previously accepted immediate review of discovery orders implicating a peer review privilege by way of a writ of certiorari in McGee v. Bruce Hosp. Sys., 312 S.C. 58, 439 S.E.2d 257 (1993).

judgments, decrees, or orders listed in S.C. Code § 14-3-330.” Woodard v. Westvaco Corp., 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995) (emphasis added).⁹ Sharing Hope acknowledges that as a general rule, pretrial discovery orders are not directly appealable under §14-3-330, but Sharing Hope maintains that the “specialized statute” of §44-7-394 provides the Court of Appeals with appellate jurisdiction of the pending appeal.

To the extent that the Court of Appeals states that §44-7-394 does not apply because Sharing Hope is not a hospital or related entity under §44-7-392, the merits of that very point are one of the issues in this appeal. The order on appeal contains a specific ruling on §44-7-392 and compels production of documents (and deposition testimony). Accordingly, the order is immediately appealable under the statutory authority of §44-7-394.

B. The Appellate Court can, and should, exercise pendant appellate jurisdiction over the interconnected issues relating to the peer review privilege as asserted by Sharing Hope.

Sharing Hope has asserted a peer review privilege based on multiple grounds. Sharing Hope contends that South Carolina law as found in prior appellate opinions and more recently codified, at least in part, in §40-71-20 and §44-7-392, recognizes a peer review privilege for retrospective self-critical analysis in the healthcare field. In addition to and in the alternative, Sharing Hope contends that longstanding, well-established public policy supports recognition of a privilege to protect peer review materials generated in the healthcare field. Sharing Hope also argues separately that its participation in the root cause analysis conducted with Grand Strand Hospital is protected by § 44-7-392.¹⁰ To the extent that any of these issues, arguably, do not fall

⁹ *Overruled on other grounds by Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002).

¹⁰ As an additional ground, Sharing Hope maintains that Virginia law provides a peer review privilege to the materials created by Sharing Hope to meet the requirement of a Virginia entity, relying upon Va. Code Ann. § 8.01-581.17.

squarely within the precise parameters of §44-7-392 (and the appellate jurisdiction conferred by §44-7-394), the Court can and should review the other grounds under its pendent appellate jurisdiction.

South Carolina appellate courts have pendant appellate jurisdiction to review interlocutory rulings that are companions with interlocutory issues that are immediately reviewable under some other authority. Morris v. Anderson Cty., 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (“this Court may, as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation”); Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 495, 450 S.E.2d 616, 618 n. 2 (Ct. App. 1994) (“The appellate courts have discretion, however, to consider an unappealable order if an appealable issue is before the court and a ruling on appeal will avoid unnecessary litigation.”).

As noted in Brown v. Cty. of Berkeley, 366 S.C. 354, 362, 622 S.E.2d 533, 538 n. 5 (2005), “Courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable.” (Citations omitted). The issues must have a nexus to justify the appellate Court’s exercise of its pendent jurisdiction. *Id.*; *see also* Smith v. Tiffany, 419 S.C. 548, 552, 799 S.E.2d 479, 481 (2017) (holding that the issue lacked a sufficient nexus or companionship); Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 338–39, 574 S.E.2d 502, 512 (Ct. App. 2002) (“the denial of the motion for summary judgment on the unjust enrichment claim is so closely connected to these other issues and constitutes a basis for the grant of summary judgment to Jackson National, we may properly review it at this time”).

The reasoning for pendent appellate jurisdiction lies in the goal of judicial efficiency and economy. *See* Woods v. Rock Hill Fertilizer Co., 102 S.C. 442, 86 S.E. 817, 819 (1915) (“it will

be better for both parties in the further progress of the case to have these questions decided”); Tate v. Oxner, 236 S.C. 313, 317, 114 S.E.2d 225, 225 (1960) (“where there is an appealable issue before the Court, an Order refusing a motion to strike may also be considered in order to avoid unnecessary litigation.”).

Sharing Hope submits that all the grounds raised in support of its assertion of a peer review privilege are closely connected so as to meet the nexus requirement for pendent appellate jurisdiction, and that judicial efficiency and economy will best be served by resolving the peer review privilege so that the parties can move forward towards litigation on the merits of the claims.

II. COMMON LAW PETITION FOR A WRIT OF CERTIORARI -- EXCEPTIONAL CIRCUMSTANCES EXIST IN THIS CASE TO WARRANT THE COURT’S IMMEDIATE REVIEW OF THE NOVEL AND IMPORTANT ISSUES PRESENTED IN THE ORDER REJECTING SHARING HOPE’S ASSERTION OF A PEER REVIEW PRIVILEGE AND COMPELLING DISCOVERY.

The jurisdiction of the Supreme Court is found in Section 5 of the State Constitution:

The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs. The Court shall have appellate jurisdiction only in cases of equity, and in such appeals they shall review the findings of fact as well as the law, except in cases where the facts are settled by a jury and the verdict not set aside. The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe. S.C. Const. art. V, § 5.

The General Assembly restates the Supreme Court’s power to issue extraordinary writs in S.C. Code § 14-3-310, and it has further defined the appellate jurisdiction of the Supreme Court in S.C. Code § 14-3-330. “Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code § 14–3–330.” Woodard v. Westvaco Corp., 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995), *overruled on other grounds* by Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002).

As discussed above, Sharing Hope acknowledges that as a general rule, pretrial discovery orders are not directly appealable under §14-3-330, but Sharing Hope maintains that the “specialized statute” of §44-7-394 provides the Court of Appeals with appellate jurisdiction of the pending appeal. In the alternative, the Supreme Court still may, in its discretion, allow immediate appellate review of pretrial discovery orders upon a petition for a writ of certiorari pursuant to the powers granted by the Constitution and §14-3-310. See Trial Handbook for South Carolina Lawyers § 4:37 (5th ed.).

Prior to the passage of §44-7-394 in 2012, the Court had addressed the process for appellate review of discovery orders involving peer review privilege in several cases. The first South Carolina appellate opinion on peer review privilege was McGee v. Bruce Hosp. Sys., 312 S.C. 58, 60, 439 S.E.2d 257, 259 (1993), wherein the Court granted a writ of certiorari to review a trial court order granting a plaintiff’s motion to compel and instructing the defendant hospital to produce the credentialing files and clinical privileges for each of the defendant physicians in a medical malpractice action. More specifically, the Court considered the question of whether the credentialing files, clinical privileges, and the policies and procedures involved in the evaluation of medical staff immune from discovery under the terms of S.C. Code §§ 40-71-10 and -20.¹¹

In Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 378 S.C. 160, 662 S.E.2d 430 (Ct. App. 2008), *vacated*, 381 S.C. 332, 673 S.E.2d 417 (2009), the defendants filed an appeal from a trial court order denying their motion for a protective order sought under § 40-71-20 and compelling production of the discovery sought by the plaintiff who was suing the hospital and staff members for defamation and conspiracy in connection with reporting the suspension of his hospital privileges to a national database. The Court of Appeals held that the order was appealable and

¹¹ This same statute is one of the grounds upon which Sharing Hope asserts its privilege.

reversed the trial court, in part, finding that questions delving into the committee's proceedings were protected and safeguarded by the statutory provisions. However, the Supreme Court vacated the Court of Appeals decision, declaring that the order on appeal was not immediately appealable.

The distinction between the two different jurisdictional outcomes in McGee and Wieters can be found in the nuances of how the privilege question was presented to the Appellate Courts. When these two opinions are read together, it appears that while a discovery order could not be reviewed on a direct appeal under §14-3-330, the Court would grant a petition for a writ of certiorari to provide immediate review of a discovery order that presented a peer review privilege issue.

This procedural distinction can be seen in a footnote in the Court's opinion in Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Env't Control, 387 S.C. 380, 692 S.E.2d 920 (2010), wherein the Court granted a writ of certiorari to review a series of discovery orders issued by the administrative law court. In footnote 1, the Court explained that the petitioners sought review of the discovery order by way of both a petition for a writ of certiorari and a notice of appeal. While the Court dismissed the notice of appeal from the discovery orders as interlocutory, it granted the writ based on its finding that exceptional circumstances existed to warrant immediate review.

The circumstances presented in this case differ on one crucial point because there is now a statutory authority -- §44-7-394 -- for immediate appeal of a discovery order arising from the peer review privilege protections of §44-7-392. However, in the face of the Court of Appeals' dismissal, the Appellant/Petitioner is renewing its common law petition for extraordinary review under the guidance distilled from the Court's decisions in McGee v. Bruce Hospital and Oncology & Hematology Associates v. SC DHEC.

In addition to those two opinions, there are other examples of cases where the Supreme Court has allowed immediate appeal of discovery orders by a writ of certiorari including:

- McMakin v. Bruce Hosp. Sys., 318 S.C. 15, 455 S.E.2d 693 (1995), wherein the trial judge ordered disclosure of names, addresses and telephone numbers of former hospital patients. On petition of the defendant, the Supreme Court allowed immediate review by a writ of certiorari.
- Laffitte v. Bridgestone Corp., 381 S.C. 460, 674 S.E.2d 154 (2009), wherein the Supreme Court granted a petition for a writ of certiorari to review a discovery order compelling defendant corporation to disclose a formula classified as a trade secret.
- Hollman v. Woolfson, 384 S.C. 571, 683 S.E.2d 495 (2009), wherein the Court granted a writ of certiorari to review a trial court order allowing the plaintiffs to contact nonparty defendant's patients.

In Laffitte, 674 S.E.2d at 160-61, the Court offered this explanation of the availability of immediate review by way of a writ of certiorari when exceptional circumstances exist:

Ordinarily, an order compelling discovery is not directly appealable. *Lowndes Products, Inc. v. Brower*, 262 S.C. 431, 205 S.E.2d 184 (1974). Nevertheless, a writ of certiorari may be issued when exceptional circumstances exist. *See In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998). The instant case presents such exceptional circumstances as it involves a novel question of law in a matter that has been the subject of numerous claims in state and federal courts. A decision by this Court at this time best serves the interests of judicial economy by eliminating the numerous inevitable appeals raising this novel issue of significant public interest. *Id.* n. 2.

The Court further expounded on the type of exceptional circumstances that would support immediate review by a writ of certiorari in Hollman, 683 S.E.2d at 497:

This matter presents exceptional circumstances which warrant the issuance of a writ of certiorari. Allowing the interviews will moot any claim petitioners could raise on appeal that the discovery was erroneously allowed. In addition, the privacy rights of patients is an issue of significant public interest, and issues

involving the release of patient information in discovery is arising more often in the courts.

In Oncology & Hematology Associates, 692 S.E.2d at 924, the Court voiced reticence to micromanage discovery orders but chose to grant immediate review of a discovery order by way of certiorari because of concern that a party's abusive discovery practice was overshadowing litigation of the merits of claims:

Our willingness to review a discovery order by way of a writ of certiorari will be as rare as the proverbial "hen's tooth." We have no desire to micromanage discovery orders. It is our hope that in resolving this matter, we will speak to trial courts generally. While discovery serves as an important tool in the truth-seeking function of our legal system, we are concerned that "discovery practice" has become a cottage industry and the merits of a claim are being relegated to a secondary status.

The Supreme Court has also allowed immediate review of trial court orders on substantive legal issues by writ of certiorari. For example, in In re Breast Implant Prod. Liab. Litig., 331 S.C. 540, 503 S.E.2d 445 (1998), the Court granted a writ of certiorari of a trial court order denying defendants' motions to dismiss strict liability and warranty causes of action in order to answer certain questions pertaining to the liability of health care providers for use of medical devices, such as breast implants. The Court carefully explained the basis for exercising its extraordinary writ authority to answer novel questions of law on issues of significant public interest, *id.* at 447 n. 2.:

Novel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions are involved in this matter. A decision by this Court would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues.

We reiterate that this Court will not issue a writ of certiorari merely to relieve a circuit court's burden of deciding difficult issues in high profile cases. However, as Judge Floyd very appropriately notes, this is not only an exceptional case of great public interest, but is also one presenting novel questions of law, which, to best serve the interests of judicial economy, should be answered at this time.

Similarly, in Binney v. State, 384 S.C. 539, 542, 683 S.E.2d 478, 479 (2009), the Court granted a writ of certiorari to review an PCR order presenting a question of whether the petitioner's attorney-

client privilege had been violated when his trial counsel turned over his entire trial file to the Attorney General's Office. The Court stated that it granted the writ of certiorari because the issue was novel and capable of arising in every PCR proceeding.

From these cases we can distill several factors evidencing exceptional circumstances that weigh in favor of granting immediate review of interlocutory discovery orders:

- A novel issue of law is presented;
- The issue is one of significant public interest;
- Judicial economy would be served by providing a definitive answer to the issue that is arising with some degree of frequency; and/or
- Compelling production without review will moot any claim on appellate review.

This case meets all these factors.

A. The question of whether the federal Organ Procurement and Transplant Network peer review process is protected by a privilege is a novel question of significant public interest.

As discussed above, the issues presented by Sharing Hope's appeal of Judge McCaslin's order are uniquely novel to the extent that the South Carolina appellate courts have never issued any appellate opinion involving assertion of a peer review privilege by an OPO, and there are no published appellate opinions interpreting or applying § 44-7-392. However, the public policy foundation for peer review privilege in the healthcare field is well established and demonstrates how important the issues are and why they need to be resolved now – not after trial.¹²

¹² For the sake of brevity encouraged by Rule 242, SCACR, the argument on the merits of these substantive issues and full discussions of relevant legal authorities can be found in Sharing Hope's appellate briefs in App. No. 2021-000487, which are incorporated herein as if fully restated.

The Court addressed “the public interest in candid professional peer review proceedings” in McGee v. Bruce Hosp. Sys., 439 S.E.2d at 259, and articulated an “overriding public policy” to promote “complete candor and open discussion” in peer review process:

The overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care. The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process. (Citations omitted.)

The *McGee* Court spoke on the importance of alleviating the participants’ fear of detrimental consequences of candidly contributing to the peer review process as necessary to accomplish the policy of encouraging full candor in peer review proceedings. *See also* Durham v. Vinson, 360 S.C. 639, 647, 602 S.E.2d 760, 763 (2004) (addressing “the policy goals of promoting candor and open discussion among participants in the peer review process.”)

Notwithstanding this clear and well-recognized public policy, the Trial Court has refused to extend a peer review privilege to Sharing Hope because the Legislative has only granted such privilege to hospitals (§44-7-392) or a committee of a professional society (§40-71-20). This point presents yet another important issue as to the Courts’ power to recognize a privilege in the absence of a legislative grant of a privilege to an OPO. Sharing Hope maintains that, notwithstanding the fact that the precise provisions of the two statutory privileges do not address the peer review process of the OPTN, the courts can, and should, recognize that public policy fully supports extending the same privilege to a federally-certified OPO (and UNOS).

It is the unique nature of the federal Organ Procurement and Transplant Network that underlies the importance of this privilege issue because the peer review process in question is required by federal law and regulation, and Sharing Hope’s continued ability to serve as South

Carolina's OPO requires compliance with UNOS' peer review process.¹³ The issue is one of significant public interest because of the critically important nature of the work of the OPTN and its OPOs and the essential role that the peer review process plays in optimizing that lifesaving work. The consequences of ordering production in this case also cannot be overstated; an order requiring such production would have a substantial chilling effect on any future peer review process conducted by UNOS because any OPO would be reticent to fully engage in the process for fear of increasing its exposure to liability. In addition, it is necessary to preserve the peer review protection in these circumstances to avoid improperly eroding the peer review protections enjoyed by other entities involved in this case.

B. Judicial economy would be served by providing a definitive answer to this important, novel privilege issue.

Sharing Hope is being forced to repeatedly face motions to compel and/or move for protective orders to assert and preserve the peer review privilege, and the motion proceedings are impeding the other issues in this case. These same peer review privilege questions will undoubtedly impact the two related cases in state and federal court. Consequently, judicial economy would be served by providing a definitive answer to this important, novel issue at this stage of the litigation so that the parties can more effectively move forward toward resolution of the merits of the case.

In addition to and apart from the specific motions and Judge McCaslin's order presented for review by the pending appeal and this Petition, Sharing Hope has asserted peer review privilege in response to a series of discovery requests and deposition questions. [See docket sheet – App.

¹³ Indeed, it is extremely unlikely that the Secretary of HHS would continue to designate an OPO as responsible for a particular region if the OPO failed to or refused to participate in the peer review process proscribed at 42 C.F.R. § 121.10.

13.] Judge McCaslin's order simply is the first to rule upon the issue thereby providing a ruling in need of appellate review.

Sharing Hope filed a motion on May 14, 2021, for a protective order to assert a peer review privilege in connection with question posed in the deposition of Tim Whelan, M.D. On May 27, 2021, Sharing Hope also filed a motion for a protective order to assert a peer review privilege in connection with questions posed in the deposition of Daniel Stanton. Sharing Hope and UNOS together filed a motion on June 11, 2021, to stay discovery during the pendency of the appeal due to the potential for multiple depositions to be reopened and the potential for inconsistent rulings. Plaintiff filed a motion to compel against Sharing Hope on May 27, 2021 and a motion to compel documents withheld on an improper claim of peer review privilege against UNOS on June 4, 2021. These motions came before Judge R Farrell Cothran on July 22, 2021, but he has not issued a formal order as to the rulings regarding privileged materials as of October 20, 2023.

In addition, Sharing Hope filed a motion for protective order for the deposition of David DeStefano on May 7, 2021 which was briefed for Judge Deadra Jefferson for the week of June 14, 2021 and which appeared on Judge Young's nonjury roster the week of October 25, 2021. Sharing Hope filed a motion for a protective order to assert a peer review privilege in connection with questions posed in the deposition of Michael Lotts. (Filed 2/18/21; also scheduled for Judge Young's nonjury roster the week of October 25, 2021). Sharing Hope filed a motion for a protective order to assert a peer review privilege in connection with questions posed in the deposition of Lorraine Kemp. (Filed September 13, 2021; also scheduled before Judge Young the week of October 25, 2021). Sharing Hope filed a motion for a protective order to assert a peer review privilege in connection with questions posed in the deposition of Jeff Thomas. (Filed September 17, 2021, which was scheduled before Judge Young, week of October 25, 2021.) Most

recently, Plaintiff Holliman filed a Motion to Compel which virtually relies on Judge McCaslin's order as binding precedent on the peer review issue, notwithstanding that her order is on appeal. (Filed September 20, 2021, which was scheduled before Judge Young, week of October 25, 2021.) Following a hearing on October 25, 2021 as to the above motions, Judge Young issued a ruling on November 4, 2021 ordering discovery in the above captioned matter to be stayed as it related to privileged materials until the applicability of the peer-review privileges were decided by an Appellate Court in South Carolina. [App. 35.]

In addition, Sharing Hope filed another Motion for a Protective Order related to documents produced by the Centers for Medicare & Medicaid Services (CMS) on January 13, 2022. Previously, in response to Plaintiff's subpoena to CMS, Sharing Hope filed a Motion to Quash in the Court of Common Pleas on October 5, 2021 as well as a Motion to Quash in the Superior Court of Fulton County in Georgia on October 21, 2021. Following Sharing Hope's filings, counsel for the Plaintiff represented to the clerk of Fulton County Senior Staff that she was withdrawing the subpoenas. However, the Plaintiff subsequently produced documents received from CMS on or about January 4, 2022. The Motion for a Protective Order relating to documents produced by CMS was denied on November 18, 2022 and Sharing Hope's Rule 59(e) Motion was denied by the Honorable Bentley Price on February 27, 2023.

These peer review privilege issues not only pervade the discovery practice in this action, but they will impact the trial when Sharing Hope will reassert the privileges in evidentiary motions. The peer review issues are also significant in two other related actions arising from other organs donated by the same donor as in this case. One action pending in Charleston County is brought by a recipient that received the donor's heart, but the transplant allegedly was not successful because of incompatible blood types and a second transplant was necessary. Ykeiah Lawrence ,

et al vs. We Are Sharing Hope SC, et al, 2021-CP-10-02033. Another action pending in federal district court is brought by a recipient who received the donor's liver, but the transplant allegedly was not successful because of incompatible blood types and a second transplant was necessary. Joe Patterson v. We Are Sharing Hope SC, et al, 2:21-cv-1242-BHH.

Of particular significance is the fact that the related peer review privilege issues have been raised in the federal Patterson action, and the district court entered an order deferring a ruling on the privilege issues to allow the South Carolina appellate courts to resolve these novel and important issues of state law. [App. 76 - ECF 100.] However, since the Court of Appeals has dismissed the appeal without fully addressing the merits of the privilege issues and the federal case is scheduled for trial in January of 2024, Sharing Hope will be filing a motion asking the federal court to certify these questions of state law to this Court pursuant to Rule 244, SCACR. [A copy of the motion when filed will be submitted forthwith.]

If this Court would grant the review, both the novel issues of appellate jurisdiction under §44-7-394 and a peer review privilege for the Organ Procurement and Transplant Network could be resolved with the most judicial efficiency to provide the most timely, final ruling so that this case (and the related cases) can move forward towards resolution on the merits.¹⁴

¹⁴¹⁴ As another point in support of this petition, Sharing Hope would draw the Court's attention to the September 20, 2021 motion filed by the Plaintiff. [App. 40.] In this motion, the Plaintiff is accusing Sharing Hope of discovery abuse because it continues to assert a peer review privilege in discovery responses and depositions. Plaintiff treats Judge McCaslin's order as binding precedent and criticizes Sharing Hope for pursuing immediate review instead of just accepting her ruling and complying. Sharing Hope maintains that its actions in diligently asserting a privilege at each and every point is prudent and necessary to avoid any basis for a waiver argument and to preserve the privilege issues for appellate review. *See e.g.* Rule 30, SCRCR (allowing/requiring privilege objections during depositions and mandating that motions for a protective order must be filed or the privilege is deemed waived); Davis v. Parkview Apartments, 409 S.C. 266, 281, 762 S.E.2d 535, 543 n. 15 (2014) ("Without specific objections to each item of discovery deemed discoverable by the circuit judge, the specific discovery findings are unreviewable on appeal.")

C. Compelling production of privileged documents and/or testimony about the peer review process would moot the issue and effectively deprive Sharing Hope of effective remedy on appeal after a final judgment.

Finally, but perhaps most significantly, the privilege issue will be mooted if Sharing Hope is compelled to produce privileged materials or answer questions about the peer review process before this Court answers the important, novel issues presented. Sharing Hope would be denied an effective review and/or remedy on appeal from any final judgment because disclosure could not be undone. Disclosure of “cat out of the bag material” such as protected/privileged materials may cause irreparable injury because it would be impossible to restore that confidentiality after appellate review, in the same sense that “the proverbial bell cannot be unrung.” See Allstate Ins. Co. v. Langston, 655 So.2d 91, 94 (Fla.1995); State v. Muncie, 746 N.E.2d 1092, 1101 (Ohio 2001).

Accordingly, based on the foregoing, the exceptional nature, scope and potential precedential impact of a ruling on whether the OPO and OPTN share a peer review privilege compels immediate review.

CONCLUSION

WHEREFORE, based on the foregoing, while Sharing Hope maintains that appellate jurisdiction for immediate review of this peer review privilege order is well-founded under the authority of §44-7-394, Sharing Hope also respectfully petitions the Court to grant the common law petition for extraordinary review to determine the important and novel issues of law presented in this matter, as an alternative to review of the Court of Appeals’ jurisdictional ruling under Rule 242.

Sharing Hope submits that review of this order, whether under common law or Rule 242, would further the progression of this litigation toward resolution of the merits of the Plaintiff’s

claims and the claims pending in the related cases. Ultimately, immediate review by this Court would best serve the public interests in judicial efficiency and in safeguarding and improving the quality of transplant patient care without any prejudice to this Plaintiff or the other plaintiffs in the related cases.

Respectfully submitted,

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