

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Oct 26 2023

S.C. 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
Sup. Ct. App. No. 2023-001653

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.

SUPPLEMENTAL APPENDIX
TO PETITIONS FOR WRIT OF CERTIORARI

HOOD LAW FIRM, LLC
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

Attorneys for Appellant/Petitioner
We Are Sharing Hope SC

INDEX to Supplemental Appendix

This Supplemental Appendix is submitted to provide the Federal Court filings referenced in the Petitions.

Patterson v. We Are Sharing Hope, et al C/A No. 2:21-cv-1242-BHH;

USDC Doc No 215: Motion to Certify Questions of State Law Peer Review Privileges, on behalf of We Are Sharing Hope SC, and Darla Welker

- (1) Exhibit Ct of Appeals Opinion
- (2) Exhibit Pet for Rehearing
- (3) Exhibit Order Deny Rehearing
- (4) Exhibit Common Law Pet for Cert
- (5) Exhibit Rule 242 Pet for Cert

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Aaliyah Patterson, as Administratrix of the
Estate of Joe Patterson,

Plaintiff,

Versus

We Are Sharing Hope SC and United Network
for Organ Sharing Elizabeth Davies, M.D.,
Jacqueline Honig, M.D., and Darla Welker,

Defendants.

C/A No. 2:21-cv-1242-BHH

**MOTION TO CERTIFY QUESTIONS OF
STATE LAW PEER REVIEW
PRIVILEGES, ON BEHALF OF WE ARE
SHARING HOPE SC, AND DARLA
WELKER**

The Defendants We Are Sharing Hope SC and Darla Welker (collectively Sharing Hope) along with the United Network for Organ Sharing (UNOS) and Jacqueline Honig, M.D., hereby move the Court for an order certifying certain novel questions of state law to the South Carolina Supreme Court to answer the following questions pursuant to Rule 244, SCACR:

1. Does South Carolina state law recognize a privilege to protect, from pretrial discovery and/or admission at trial, certain communications and materials exchanged by the South Carolina Organ Procurement Organization (OPO - Sharing Hope) and the Membership & Professional Standards Committee (MPSC), operated by UNOS as the administrator of the federal Organ Procurement and Transplant Network, during a mandated retrospective, self-critical quality assurance and peer review evaluation?
2. Does South Carolina recognize a privilege to protect, from pretrial discovery and/or admission at trial, certain communications and materials generated as part of a root cause analysis meeting between Sharing Hope and the donor hospital, Grand Strand Medical Center?

The basis for this motion is set forth below¹ and in the previously filed motions and memoranda.

¹ Pursuant to Local Civil Rule 7.04, the undersigned certifies that a full explanation of this motion and the contents of required memoranda described in Local Civil Rule 7.05 are provided herein, such that the filing of a separate memorandum would serve no useful purpose.

PERTINENT BACKGROUND

The facts and the issues regarding the privilege issues have been extensively presented and discussed in multiple filings in this case and the related actions in state court. Without undue repetition, the Defendants would recount the following condensed summary as context for this motion.

Sharing Hope serves as the South Carolina OPO in the federal Organ Procurement and Transplant Network (OPTN). In November 2018, Sharing Hope offered certain organs for transplant through the UNOS system, including a liver, from a donor patient at Grand Strand Medical Center. As part of its responsibility as the OPO, Sharing Hope took steps to determine and report the donor's ABO blood type in accordance with §2.6.A of the governing OPTN Policy. Sharing Hope reported that the donor's ABO blood type was "O," and her liver was matched through the UNOS system with Joe Patterson. After the liver transplant, complications led to discovery that the donor's ABO blood type was "A."

Following the events that transpired in connection with Sharing Hope's actions in the reporting of information about organs from the donor, Sharing Hope participated in two retrospective peer review processes. As required by OPTN Policy and as a condition of Sharing Hope's designation and certification as an OPO, Sharing Hope participated in a self-critical peer review process with the MPSC operated by UNOS; and Sharing Hope also consulted with the donor hospital (Grand Strand Medical Center) in a root cause analysis.

The Plaintiff is asserting claims against Sharing Hope based on allegations that the OPO was negligent in determining and reporting the donor's ABO blood type.² Plaintiff seeks to

² There also are claims asserted by or on behalf of the recipients of the heart and kidneys in state court actions pending in Charleston County Circuit Court. Ykeiah Lawrence, et al vs. We Are Sharing Hope SC, et al, 2021-CP-10-02033; Michelle Cha Holliman, et al vs. We Are Sharing Hope SC, et al, C/A No. 2020-CP-10-02902/ Court of Appeal No. 2021-000487.

discover and to attempt to prove her claims with documents and materials produced and/or created in connection with the MPSC peer review and the root cause analysis processes.

The privilege question, as broadly stated, is whether materials which are produced and/or created in a retrospective, self-critical peer review process and/or a root cause analysis conducted by Sharing Hope after the events giving rise to Plaintiff's claim are privileged and protected from pretrial discovery and from admission at trial? More specifically, stated in the context of the distinct review processes, the questions have been framed in terms of:

1. Whether certain communications and materials created and/or exchanged by Sharing Hope and the MPSC, operated by UNOS, during a mandatory retrospective, self-critical quality assurance and peer review evaluation conducted following the OPO's management and coordination of the donor's organs, are privileged and protected from pretrial discovery and admission at trial?
2. Whether certain communications and materials generated as part of a root cause analysis consultation between Sharing Hope and Grand Strand Medical Center following the sentinel event in question are privileged and protected from pretrial discovery and admission at trial?

These questions have arisen and been briefed in this case in certain filings, including:

1. Plaintiff's Motion for Clarification That Documents Produced by Non-Party Subpoena Recipient United States Centers for Medicare & Medicaid Services Are Not Privileged [ECF 57];
2. We Are Sharing Hope SC's Motion for a Protective Order [ECF 58];
3. Defendant We Are Sharing Hope SC's Memorandum in Response to Plaintiff's Motion for Clarification that Documents Produced by Non-Party Subpoena Recipient United States Centers for Medicare & Medicaid Services Are Not Privileged [ECF 59];
4. Plaintiff's Response in Opposition to Defendant We Are Sharing Hope SC's Motion for a Protective Order [ECF 61];
5. Plaintiff's Reply in Support of His Motion for Clarification that Documents Produced by Non-Party Subpoena Recipient United States Centers for Medicare & Medicaid Services Are Not Privileged [ECF 62]; and

6. We Are Sharing Hope SC's Reply to Plaintiff's Response in Opposition to Defendant We Are Sharing Hope SC's Motion for a Protective Order [ECF 65].

As this Court was advised, these privilege issues have also been raised in the state court action, Michelle Cha Holliman, et al vs. We Are Sharing Hope SC, et al, C/A No. 2020-CP-10-02902, wherein the circuit court issued an order compelling Sharing Hope to respond to discovery and produce documents to which it had asserted the same privileges and made the same arguments. Sharing Hope duly filed an appeal with the South Carolina Court of Appeals, which has been fully briefed. [S.C. Court of Appeal No. 2021-000487.] Recognizing that the issues raised in the state court appeal are similar to the issues presented in this action now in federal court by virtue of diversity jurisdiction, this 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. [ECF 100.]

The Court of Appeals dismissed the Holliman appeal as interlocutory and not immediately appealable by order of May 24, 2023. [Ex. 1.] Sharing Hope filed a Petition for Rehearing which was denied by order filed September 21, 2023. [Ex. 2 and 3.] Sharing Hope has filed a Rule 242 Petition for a Writ of Certiorari as well as a common law Petition for a Writ of Certiorari with the South Carolina Supreme Court seeking an answer to these important and novel issues of state law. [Ex. 4 and 5.] In addition, or in the alternative, Sharing Hope moves this Court to certify the important and novel issues of state law to the South Carolina Supreme Court. By the certiorari petitions together with this motion, Sharing Hope seeks to obtain a ruling from the South Carolina Supreme Court on these important and novel questions of state law.

DISCUSSION OF APPLICABLE LAW

In accordance with *Erie Doctrine*³, a federal court sitting in diversity must apply the law of the forum state. In the absence of any controlling case law directly on point, a federal court may attempt to do as a state circuit court would do based on existing state caselaw. However, where there is insufficient state law the federal court may decide to certify the question to the state appellate court. Roe v. Doe, 28 F.3d 404, 407 (4th Cir. 1994).

Certification of questions to the South Carolina Supreme Court is governed by Rule 244, SCACR, which provides, in pertinent part:

(a) Scope of Certification. The [South Carolina] Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States ... when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

The pertinent points for consideration by a federal court in deciding whether to certify a question of state law are (1) whether an answer to the question may be determinative of the issue pending before the federal court; and (2) whether available state law on the subject is insufficient to answer the question. See In re Mt. Hawley Ins. Co., 736 F. App'x 392, (Mem)–393 (4th Cir. 2018), *certified question answered*, 427 S.C. 159, 829 S.E.2d 707 (2019); Poly-Med, Inc. v. Novus Sci. Pte. Ltd., 841 F. App'x 511, 512 (4th Cir. 2021), *certified question answered*, 437 S.C. 343, 878 S.E.2d 896 (2022).

In Mount Hawley, the Fourth Circuit certified a question to the South Carolina Supreme Court, pursuant to Rule 244, regarding an issue of whether there was an exception to or waiver of the attorney-client privilege under South Carolina law. In certifying the question, the Fourth Circuit noted that there was no controlling precedent from the South Carolina appellate courts to

³ Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

provide an answer and that the answer might be determinative of the challenge to an order compelling production of materials to which a privilege had been asserted.

By the same reasoning, this Court should certify these peer review privilege questions to the South Carolina Supreme Court. The questions are novel and there is no caselaw from the South Carolina appellate court to aid this Court in answering the unique questions of whether state law recognizes a peer review privilege that allows Sharing Hope, as the South Carolina OPO, to assert protection over the materials and documents that were produced and created in the federally-mandated peer review process with UNOS' MSPC and the root cause analysis with the donor hospital. The answers to these questions are important and determinative of the pending discovery motions. In addition, the answers to the privilege questions are important and may be determinative on the merits of the claims in the context of whether certain CMS/Senate committee documents which Plaintiff already has acquired would be admissible at trial.

Pursuant to the scheduling order [ECF 108], discovery is closed and complete (apart from these unresolved questions about the privilege posed in the pending discovery motion), and this action is ready for disposition on the merits by virtue of the pending cross motions for summary judgment, or a jury trial. If the South Carolina appellate courts cannot (or decline to) answer the privilege questions in the Holliman appeal because of an appellate jurisdiction issue, then this Court could be left with the untenable choice of answering the novel and important questions and making state law itself, or staying resolution of this action until the Holliman case proceeds all the way through to an appeal from a final judgment on the merits. By certifying these questions pursuant to Rule 244, this Court may be able to obtain the answers of state law from the South Carolina Supreme Court so this federal case can proceed more promptly to a final resolution on the merits.

The Defendants UNOS and Dr. Honig join in this motion. As required by Local Rule 7.02, Plaintiff was consulted and Plaintiff has indicated that she will oppose the motion.

CONCLUSION

For the foregoing reasons, the below named Defendants respectfully ask the Court to certify these novel and important questions of South Carolina state law to the South Carolina Supreme Court.

Respectfully submitted,

/s/ Jean Marie Jennings

Molly H. Craig (6671)

molly.craig@hoodlaw.com

Jean Marie Jennings (11787)

jeanmarie.jennings@hoodlaw.com

HOOD LAW FIRM, LLC

172 Meeting Street

Post Office Box 1508

Charleston, SC 29402

P: 843-577-4435/F: 843-722-1630

***Attorneys for the Defendants We Are
Sharing Hope SC and Darla Welker***

/s/ Lindsay A. Joyner

John T. Lay, Jr. (5539)

jlay@gwblawfirm.com

Lindsay A. Joyner (11557)

ljoyner@gwblawfirm.com

Jessica W. Laffitte (11846)

jlaffitte@gwblawfirm.com

Kendall P. Crawford (13565)

kcrawford@gwblawfirm.com

GALLIVAN, WHITE & BOYD, P.A.

Post Office Box 7368

Columbia, SC 29202-7368

***Attorneys for Defendant Jacqueline Honig,
M.D.***

/s/ Lindsay Amber Nishan

Richard D. Addison (6871)

daddison@hallboothsmith.com

Lindsay Amber Nishan (13633)

lnishan@hallboothsmith.com

HALL BOOTH SMITH, P.C.

111 Coleman Blvd, Suite 301

Mount Pleasant, SC 29464

Phone: 843.720.3460

***Attorneys for the Defendant United Network
for Organ Sharing***

EXHIBIT 1

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2021-000487

Appeal From Charleston County
Debra R. McCaslin, Circuit Court Judge

Unpublished Opinion No. 2023-UP-205
Submitted May 17, 2023 – Filed May 24, 2023

APPEAL DISMISSED

Mary Agnes Hood Craig, of Hood Law Firm, LLC, of
Charleston; Jean Marie Jennings, of Charleston; and
Deborah Harrison Sheffield, of Columbia, all for
Appellant We Are Sharing Hope SC.

Jack G Gresh, of Dodds Hennessy & Stith, LLP, of Mount Pleasant; Lauren Spears Gresh, of Hall Booth Smith, PC, of Mount Pleasant; and Robert L. Widener of Burr and Forman, LLP, of Columbia, all for Appellant United Network for Organ Sharing.

John Carroll Moylan, III, Mary Lucille Dinkins, and James Hunter May, all of Wyche, PA, of Columbia; and Rachael Lewis Anna, of Wyche, PA, of Greenville, all for Respondent.

PER CURIAM: We Are Sharing Hope SC (WASH) and United Network for Organ Sharing appeal the circuit court's order denying their collective motions for a protective order and granting Michelle Cha Holliman's motion to compel WASH to produce documents withheld on a claim of peer review privilege. This order is not immediately appealable under section 44-7-394 of the South Carolina Code (2018) because WASH is not "a hospital or affected person." Accordingly, the appeal is dismissed pursuant to Rule 220(b), SCACR, and the following authorities: *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) ("[D]iscovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right."); § 44-7-394(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"); § 44-7-394(B) ("For purposes of this section an 'affected person' means a *person*" (emphasis added)).

APPEAL DISMISSED.¹

WILLIAMS, C.J., and VINSON and VERDIN, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

EXHIBIT 2
THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Jun 07 2023
SC Court of Appeals

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

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

PETITION FOR REHEARING
behalf of Appellant We Are Sharing Hope SC

In this action, Defendant-Appellant We Are Sharing Hope SC (Sharing Hope) appeals 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. The Court has dismissed the appeal as interlocutory: “This order is not immediately appealable under section 44-7-394 of the South Carolina Code (2018) because WASH is not ‘a hospital or affected person.’” As required by Rule 242(d)(2)¹, SCACR, the Appellant Sharing Hope respectfully petitions for rehearing, pursuant to Rule 221, SCACR, and points to the following points which have been overlooked or misapprehended by the court.

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

Sharing Hope has acknowledged that as a general rule, pretrial discovery orders are not directly appealable under §14-3-330, but Sharing Hope maintains that §44-7-394 provides the Court of Appeals with appellate jurisdiction of the pending appeal from the order compelling Sharing Hope to produce materials that were created as part of a peer review process mandated by the federally-created Organ Procurement and Transplant Network. To the extent that the Court considers that §44-7-394 does not apply because Sharing Hope is not a hospital or related person, the Court has overlooked or misapprehended that 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.

2. 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. In addition to contending that South Carolina law, as found in §40-71-20 and §44-7-392, recognizes a peer

¹ “Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”

review privilege for retrospective self-critical analysis in the healthcare field, Sharing Hope also contends that longstanding, well-established public policy supports recognition of a privilege to protect peer review materials generated in the healthcare field. Sharing Hope separately argues that its participation in the root cause analysis conducted with Grand Strand Hospital is protected by § 44-7-392.² To the extent that any of these issues, arguably, do not fall 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 in the interest of judicial efficiency and economy. 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.”). *See also* 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.”).

Conclusion

Wherefore, based on the appellate jurisdiction issues as argued in the brief and in the foregoing petition, Sharing Hope respectfully submits that the Petition for Rehearing should be granted and the case should proceed to disposition on the merits of the privilege issues.

² 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.

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

Attorneys for Appellant We Are Sharing Hope SC

June 7, 2023

Charleston, South Carolina

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Jun 07 2023

SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned certifies that on this **7th** day of **June 2023**, a copy of the **Petition for Rehearing 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@rogerstownsend.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)

EXHIBIT 3
The South Carolina Court of Appeals

Michelle Cha Holliman, individually and as personal
representative of the Estate of Allen B. Holliman,
Respondent,

v.

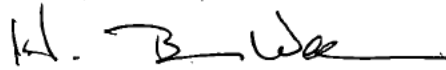
We Are Sharing Hope SC, Medical University of South
Carolina, United Network for Organ Sharing, Jacqueline
Honig, M.D., and Darla Welker, Defendants,

of which We Are Sharing Hope SC and United Network
for Organ Sharing are the Appellants.

Appellate Case No. 2021-000487

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

FILED
Sep 21 2023

cc:

Mary Agnes Hood Craig, Esquire
Jean Marie Jennings, Esquire
Deborah Harrison Sheffield, Esquire
John Carroll Moylan, III, Esquire
Mary Lucille Dinkins, Esquire
James Hunter May, Esquire
Rachael Lewis Anna, Esquire
Christine Kent Toporek, Esquire
Christina Woodward Strong, Esquire
Kelly McPherson Jolley, Esquire
Ariail Burnside Kirk, Esquire
Robert L. Widener, Esquire
Alan Ross Belcher, Jr., Esquire
Lindsay Amber Nishan, Esquire

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Oct 23 2023

S.C. SUPREME COURT

EXHIBIT 4
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,

HOOD LAW FIRM, LLC

/s/ Molly 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

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

October 23, 2023

RECEIVED

Oct 23 2023

S.C. SUPREME COURT

EXHIBIT 5
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,

v.

Respondent,

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.

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

We Are Sharing Hope SC submits this 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. 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 Appeals¹ and certain other documents filed in this case and other related court cases which are submitted herewith.

Certification by Counsel

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.

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:

- I. Should post-incident self-critical materials prepared or exchanged by an Organ Procurement Organization pursuant to a requirement of its membership in the

¹ 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. 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).

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.² 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.³

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

² See generally <https://optn.transplant.hrsa.gov/members/committees/membership-and-professional-standards-committee/>.

³ https://optn.transplant.hrsa.gov/media/1201/optn_bylaws.pdf.

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 analysis⁴ 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 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.]

⁴ 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>.

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.⁵ [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 common law review as an 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. 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 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;

⁵ Sharing Hope also moved 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.

- 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 § 44-7-392.⁶ 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 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.

⁶ 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.

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)⁷. 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 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).⁸ Sharing Hope acknowledges that

⁷ 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).

⁸ *Overruled on other grounds by* Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002).

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 has held 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 § 44-7-392.⁹ To the extent that any of these issues, arguably, do not fall 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.

⁹ 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.

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 -20.¹⁰

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 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.

¹⁰ This same statute is one of the grounds upon which Sharing Hope asserts its privilege.

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 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.¹¹

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:

¹¹ 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 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.¹² The issue is one of

¹² 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.

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.] 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; however, Judge Cothran 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. [See docket sheet – App. 45.] 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. [See docket sheet – App. 56.]

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 common law review, the novel issues regarding the peer review privilege(s) 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.¹³

¹³¹³ As another point in support of the Petition for a Writ of Certiorari, 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, SCRCRCP (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(s) compels immediate review.

CONCLUSION

WHEREFORE, based on the foregoing, 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, and respectfully petitions this Court to grant review of the Court of Appeals’ jurisdictional ruling and allow the appeal to proceed on the merits of the privilege issues. In the alternative, Sharing Hope 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.

Sharing Hope submits that review of this order, whether by a Rule 242 writ of certiorari to vacate the Court of Appeals’ dismissal on appellate jurisdiction grounds, or by common law

extraordinary relief, 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,

HOOD LAW FIRM, LLC

/s/ Molly 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

Attorneys for Appellant/Petitioner

We Are Sharing Hope SC

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