STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Michelle Cha Holliman, individually and as personal representative of the Estate of Allen B. Holliman,)
Plaintiff,)
)
vs.)
)
)
We Are Sharing Hope SC, Medical University of South Carolina, United Network for Organ Sharing, Jacqueline Honig, M.D., and Darla Welker,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

C/A No. 2020-CP-10-02902

ORDER REGARDING DISCOVERY

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This matter comes before the Court by way of a Motion to Compel brought by Plaintiff Michelle Cha Holliman ("Mrs. Holliman"), individually and as personal representative of the Estate of Allen Holliman ("Mr. Holliman") (collectively "Plaintiff"). Plaintiff seeks an Order compelling Defendant We Are Sharing Hope SC ("WASH") to produce documents withheld on a claim of peer review privilege, to provide complete discovery responses to Plaintiff's discovery requests, and to obtain full and complete answers to questions posed to Defendant Darla Welker ("Ms. Welker") during her deposition. The matter was scheduled to be heard during the week of March 15, 2021, and the parties submitted briefs to the Court to rule without oral argument. After a status conference was held on April 13th, 2021, via WebEx Virtual Courtroom, the Court further provided the parties the opportunity to submit supplemental memoranda in support of the arguments described herein. For the reasons set forth below, this Court declines to extend the application of the peer-review privilege under South Carolina law to Defendant WASH and therefore GRANTS Plaintiff's Motion to Compel.

Introduction

Plaintiff alleges that Allen B. Holliman suffered from lung problems and that physicians at Defendant Medical University of South Carolina ("MUSC") determined he was a suitable candidate for a double-lung transplant and subsequently placed him on a transplant list. On

November 27, 2018, MUSC informed Holliman he matched with a pair of available donor lungs from donor AFKY198, 2018-0516, and 18-15828 (the "Donor"), which were procured and distributed by Defendant WASH, an organ procurement organization ("OPO") that provides organ donor services to hospitals throughout South Carolina. Holliman's MUSC physicians approved him for a double-lung transplant after finding no contraindications for pursuing the transplant. On November 27, 2018, Holliman underwent a double-lung transplant at MUSC. During the surgery, Holliman had complications, and MUSC subsequently discovered the Donor had type A blood, which was incompatible with Holliman's type O blood. Holliman passed away on November 28, 2018, from hyperacute rejection of his transplanted lungs. Plaintiff alleges Defendant UNOS ("UNOS") is an organization headquartered in Virginia that manages and serves as the organ transplant system in the United States, the Organ Procurement and Transplantation Network (the "OPTN"), under a contract with the federal government. UNOS manages and serves as the one and only organ transplant system in the United States, and as set forth in Plaintiff's Complaint, UNOS's responsibilities as the OPTN for the United States include, "managing the national transplant waiting list," "matching donors to recipients," and "monitoring every organ match." Plaintiff alleges WASH evaluated the suitability of the lungs for transplant, listed the Donor as having type O blood, and distributed the lungs for transplant. Specifically, WASH was the entity responsible for determining the Donor's blood type by testing at least two blood samples from the Donor indicating a blood-type match.

In discovery, Plaintiff has sought to obtain 335 pages of documents from WASH and depositions responses from WASH's employee Ms. Welker, who is also a defendant in this case. WASH argues that these documents and the deposition responses are privileged under South Carolina's two peer review statutes. In the alternative, WASH asks this Court to extend the peer review protections potentially afforded under Virginia law, federal law, or to invoke public policy goals found in both state and federal law, which it argues weigh in favor of a finding that WASH is entitled to invoke peer review privilege, even if WASH does not fall within the current protections of South Carolina's statutes. These materials, which have been described in WASH's 4th Amended privilege log, were provided to this Court for *in camera* review. Upon review, this Court makes the following findings:

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1) <u>Whether WASH is Entitled to Peer Review Privilege Under South Carolina law</u>

WASH argues that the withheld materials are protected under the plain language of both the South Carolina's peer review statute, S.C. Code Ann. § 40-71-20 and South Carolina's "new" or supplemental peer review statute, S.C. Code Ann. § 44-7-392. Plaintiff argues that neither statute permits WASH to assert peer review privilege, as they are not included in the terms of the statute.

The cardinal rule of statutory interpretation is to determine the intent of the legislature. *Georgia–Carolina Bail Bonds. v. County of Aiken*, 354 S.C. 18, 579 S.E.2d 334 (Ct. App.2003); *see also Gordon v. Phillips Utils. Inc.*, 362 S.C. 403, 608 S.E.2d 425 (2005) ("The primary purpose in construing a statute is to ascertain legislative intent."); *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 205, 544 S.E.2d 38, 44 (Ct.App.2001) ("The quintessence of statutory construction is legislative intent."). However, all rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *McClanahan v. Richland County Council*, 350 S.C. 433, 567 S.E.2d 240 (2002). The legislature's intent should be ascertained primarily from the plain language of the statute. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct. App.2004). If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003).

A. S.C. Code § 40-71-20

WASH first asserts that it is entitled to invoke peer review privilege pursuant to SC Code Ann. § 40-71-20, entitled "Confidentiality of certain proceedings, records and information; reporting accidents and incidents". Section (A) of the statute provides:

> "All proceedings of and all data and information acquired by the committee referred to in Section 40-71-10 in the exercise of its duties are confidential unless a respondent in the proceeding requests in writing that they be made public. These proceedings and documents are not subject to discovery, subpoena, or introduction into evidence in any civil action except upon appeal from the committee action. Information, documents, or records which are otherwise available from original sources are not immune from discovery or use in a civil action merely because they were presented

> during the committee proceedings, nor shall any complainant or witness before the committee be prevented from testifying in a civil action as to matters of which he has knowledge apart from the committee proceedings or revealing such matters to third persons."
>
> S.C. Code Ann. § 40-71-20 (A)

The "committee referred to in § 40-71-10" is "an appointed committee which is formed to maintain professional standards of a state or local professional society as defined in this section . . . ." S.C. Code Ann. § 40-71-10(B). Section 40-70-10 describes the entities who are provided the authority to invoke peer-review privilege in § 40-71-20 (A), which includes "legal, medical, osteopathic, optometric, chiropractic, psychological, dental, accounting, pharmaceutic, and engineering organizations having as members at least a majority of the eligible licentiates in the area served by the particular society and any foundations composed of members of these societies".

WASH is a South Carolina non-profit corporation that does business as an organ procurement organization and procures and distributes donor organs. WASH does not assert that it is an appointed committee under the statute, nor that it is a committee appointed by a professional society to maintain the professional standards of the society. WASH does not claim to have a majority of eligible licentiates in the area it serves (South Carolina), and it does not have more than a handful of professional licentiates of any type. The plain language of the statute clearly provides protection to committees appointed by a professional society to maintain the professional standards of the society. WASH is not a committee appointed to maintain the professional standards of a professional society, its documents and Ms. Welker's knowledge regarding WASH's investigations relating to Mr. Holliman's death are therefore not subject to peer review privileged under § 40-71-20.

B. S.C. Code Ann. S.C. Code § 44-7-392

WASH next argues that it may properly invoke peer review privilege pursuant to § 44-7-392(A)(1), which states: "[a]ll proceedings of, and all data, documents, records, and information prepared or acquired by, a hospital licensed under this article, its parent, subsidiaries, health care system, committees, whether permanent or ad hoc, including the hospital's governing body, or

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physician practices owned by the hospital (its parent or subsidiaries) relating to the following are confidential . . . ." WASH does not assert that it is a hospital, or that it otherwise falls within the entities specifically described in the statute. Because WASH is not a hospital, nor any entity specifically described in the plain language of the statute, its documents and any knowledge Ms. Welker has about WASH's investigations related to this case are not privileged under § 44-7-392.

C. Documents Provided to a Source which Could Invoke Peer Review Privilege

WASH next argues that some of its documents and the information sought during Ms. Welker's deposition are privileged because they were shared with both Grand Strand Hospital and a committee of Defendant United Network Organ Sharing ("UNOS"). This argument does not extend protection to WASH. Both peer review statutes expressly provide that documents and information available from sources other than the hospital or committee protected by the statute are not immune from discovery from such other sources simply because they were presented to the hospital or the committee. Section 40-71-20(A) provides that "Information, documents, or records which are otherwise available from original sources are not immune from discovery or use in a civil action merely because they were presented during the committee proceedings . . . ." Likewise Section 44-7-392(A)(3) provides that "Data, documents, records, or information which are otherwise available from original sources are not confidential and are not immune from discovery from the original source under this section or use in a civil action merely because they were acquired by the hospital."

In this context, the South Carolina Supreme Court has explained: "We interpret the 'otherwise available' language [of § 40-71-20] to mean that information that is available from a source other than the committee does not become privileged simply by being acquired by the review committee. Accordingly, the statute does not protect information if obtained from alternative sources." *McGee v. Bruce Hosp. Sys.*, 312 S.C. 58, 62, 439 S.E.2d 257, 260 (1993).

Therefore, even if WASH shared some of its documents and information with entities that, unlike WASH, are subject to a peer review statute, such documents and information are still subject to discovery from WASH pursuant to the plain language of the statutes.

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2) Whether Public Policy Requires this Court to Grant WASH Peer Review Privilege

WASH next argues that the Court should extend peer review privilege under both Virginia state law and federal law, and that public policy favors doing so. Specifically, WASH, a South Carolina non-profit, asks the Court to extend the peer review protections provided by Virginia Code § 8.01-581.17, on the basis that Defendant UNOS is a Virginia entity and that Defendant UNOS required WASH to participate in the self-critical quality assurance and peer review process. WASH also argues public policy behind federal law, including the Patient Safety Quality Improvement Act of 2005 ("PSQIA") promotes the extension of peer review privilege to organizations like WASH, even if the statute does not expressly do so. See 42 U.S.C.A. § 299b-22.

Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred. *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997); *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994). However, South Carolina also recognizes a "public policy exception" to the enforcement of an out of state law. *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001).

WASH, at length, implores this Court to extend peer review privilege on the basis of public policy. WASH claims that compelling the disclosure of these documents will lead to "an immediate, chilling effect on full, candid, self-critical assessment in violation of the clearly mandated South Carolina public policy for the same" and that permitting said disclosure of any documents provided to entities who could properly invoke the peer review privilege would "nullify the protections to which other entities are entitled and would undermine the privilege altogether".

South Carolina indeed recognizes and encourages the policy of extending peer review privilege to promote qualitative review to improve patient care, and the South Carolina Supreme Court has held, "[t]he 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." *Durham v. Vinson*, 360 S.C. 639, 646, 602 S.E.2d 760, 763 (2004); *McGee v. Bruce Hosp. Sys.*, 312 S.C. 58, 61, 439 S.E.2d 257, 259 (1993). While WASH's public policy arguments are not without merit, under the plain meaning rule, it is not this Court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509

S.E.2d 261 (1998). Therefore, this Court declines to invoke the public policy exception to extend peer review privilege where the Legislature and the statutes at issue clearly did not do so.

Conclusion

Upon careful review, this Court finds that Defendant We Are Sharing Hope is not entitled to claim peer review privilege under South Carolina law, and this Court must effectuate the plain meaning of the statutes, rather than rely on the public policy exception to extent peer review privilege to new and unique entities. The Court therefore GRANTS the Plaintiff's Motion to Compel and DENIES Defendants Motions for Protective Orders.[1] The Court further orders that:

1) WASH produce all of the documents it has withheld on a claim of peer review privilege, which were submitted to the Court for an in camera review and which have been Bates-labeled WASH Privileged 0001-0335;

2) Ms. Welker's deposition be reconvened and that Ms. Welker answer all questions she was previously instructed not to answer as well as any related questions; and

3) WASH shall provide complete discovery responses to any discovery requests to which a claim of peer review privilege was asserted.

THEREFORE, IT IS HEREBY ORDERED THAT Plaintiff's Motion to Compel is hereby granted, Defendants collective Motions for Protective Orders submitted in opposition are hereby DENIED, and Defendant We Are Sharing Hope shall produce the documents described herein within seven (7) days of this Court's Order.

IT IS SO ORDERED.

____

Debra R. McCaslin
Circuit Court Judge

Lexington, SC
April 29, 2021

[1] The Court declines to award Plaintiff attorneys fees and costs pursuant to § 40-71-30, as the Court finds WASH had a good-faith basis for asserting the claim of confidentially, and that said claim was not made unreasonably. ("In the event the court finds that a party acted unreasonably in unsuccessfully asserting the claim of confidentiality, the court shall assess attorney's fees against that party for any fees incurred by the requesting party in obtaining the documents.")

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Charleston Common Pleas

Case Caption: Michelle Cha Holliman , plaintiff, et al VS We Are Sharing Hope Sc , defendant, et al

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Type: Order/Other

So Ordered

Debra R. McCaslin

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