THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

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.

INITIAL BRIEF OF APPELLANT
We Are Sharing Hope SC

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STATEMENT OF THE ISSUES ON APPEAL

Did the Trial Court err in granting the Plaintiff's Motion to Compel and denying the Defendant We Are Sharing Hope SC's Motion for Protective Order because the materials and information sought are protected by a peer review privilege?

Or, as otherwise stated:

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?

STATEMENT OF THE CASE

This wrongful death action arises out of the death of Allen B. Holliman (Patient) after he underwent a double-lung transplant at the Medical University of South Carolina (MUSC) on November 27, 2018. The Personal Representative of his estate, Plaintiff, presents claims against MUSC, We Are Sharing Hope SC (Sharing Hope), and the United Network for Organ Sharing (UNOS) in connection with the process and procedures by which the organ was donated. [ROA ___; Complaint, filed July 9, 2020.] All of Plaintiff's claims are focused on the manner and method by which the transplant organs were identified as a match for the Patient – a process that involves several different organizations who are part of the United States' Organ Procurement and Transplant Network (OPTN). [ROA ___; 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, a non-profit incorporated under South Carolina law, 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. [ROA ___, ___; Complaint ¶ ___; Sharing Hope Amended Answer ¶ 3.]

The issue on appeal arises from Sharing Hope's assertion of peer review privilege during discovery – an assertion specific to certain self-critical, peer review activities performed by Sharing Hope after the transplant at issue.[1] To be clear: Sharing Hope has produced all of its

[1] The issue of the peer review privilege was also raised by UNOS, who has filed a separate appeal. The appeals have been consolidated, but UNOS will present its arguments in its own brief.

medical records for the Donor.[2] It has also produced various policies and procedures, audit details, and contemporaneous communications between its employees regarding the Donor. However, Sharing Hope has objected to the production of materials generated during its post-incident peer review activities and has prepared a privilege log, as subsequently amended, listing certain documents (numbered 0001-0335) withheld on this basis.

Sharing Hope asserted, and maintains, that the withheld documents are privileged under S.C. Code § 40-71-20 and/or § 44-7-392, because these self-evaluative and deliberative materials were created during a retrospective, self-critical quality assurance and peer review evaluation required by UNOS in connection with the Patient's death. [ROA ___, ___, ___, ___; Exhibits A, D, H to Ex. A to Plaintiff's November 18, 2020 Motion to Compel – Sharing Hope's privilege logs; Ex. B to Plaintiff's February 5, 2021 Motion to Compel – Sharing Hope's Responses to Plaintiff's First Set of Supplemental Requests for Production, Sharing Hope's Third Amended Privilege Log.] In addition, Sharing Hope has asserted a privilege as to certain documents prepared as part of its participation in a retrospective review/root cause analysis conducted by Sharing Hope and the donor hospital Grand Strand Medical Center. [See Privilege Log numbered 0187-0195.]

PROCEDURAL HISTORY

Plaintiff filed a Notice of Intent to File Suit and accompanying expert affidavit on July 17, 2019 indicating her intent to sue Sharing Hope alone. [ROA __; Notice of Intent (NOI).] Plaintiff subsequently filed an Amended Notice of Intent to File Suit and an updated expert affidavit on

[2] Initially, Plaintiff attempted to obtain the Donor's records without providing an appropriate HIPAA authorization. Sharing Hope objected to the production of the Donor's records as such a request would require Sharing Hope to commit a HIPAA violation in producing the requested materials. Sharing Hope produced the Donor's records after the Trial Court denied its motion to quash, thereby satisfying HIPAA obligations. [ROA ___; Order, filed July 24, 2020.]

April 7, 2020, indicating her intention to also sue UNOS and MUSC. [ROA __; Amd. NOI.] The Complaint was filed on July 9, 2020, naming Sharing Hope, UNOS, and MUSC as defendants. [ROA __; Compl.] Sharing Hope filed an amended answer on August 12, 2020, denying the allegations of negligence, and asserting a defense of good faith immunity under the terms of the Uniform Anatomical Gift Act, S.C. Code Ann. §§44-43-300 et seq., as well as defenses and protections under the charitable immunity statutes found in S.C. Code Ann. § 33-56-170(1) and § 33-56-180(A). [ROA ___; Amd. Answer.] MUSC filed an answer on August 12, 2020. [ROA ___; Answer.] UNOS initially filed a motion to dismiss pursuant to Rule 12(b)(2) and 12(b)(6) which was denied by order of December 29, 2020; thereafter, UNOS filed an answer on November 22, 2020. [ROA ___, ___, ___; Motion, Order, Answer.]

On December 28, 2020, Plaintiff filed a Notice of Intent to File Suit against two employees of Sharing Hope which was accompanied by an affidavit from a second expert. [ROA ___; NOI as to Sharing Hope Employees Honig and Welker.] Plaintiff recently moved to amend her complaint to raise claims directly against these employees – a motion which was granted as recently as July 26, 2021. [ROA ___; Motion.]

Specific to this appeal, Plaintiff filed a motion to compel on November 18, 2020 challenging Sharing Hope's peer review privilege assertions. [ROA ___; Plaintiff's Motion to Compel, Nov. 18, 2020.] Plaintiff also filed a motion to compel against MUSC, seeking the same materials, on November 18, 2021. [ROA ___; Motion.] On December 15, 2020, Sharing Hope filed a related Motion for a Protective Order regarding questions posed in the deposition of Sharing Hope employee, Darla Welker, related to information about a meeting held in conjunction with the root cause analysis post-action review with the donor hospital, which is also protected by the

peer review privilege.[3] [ROA ___; Sharing Hope's Notice Of Motion And Motion For A Protective Order.] Sharing Hope submitted memoranda in support of its motion and in opposition to the Plaintiff's motion. [ROA ___, ___; Memorandum, filed March 12, 2021, Supplemental/Reply memorandum, filed March 15, 2021.] After reviewing the parties' written submissions, the Trial Court requested that the parties present oral argument on these Motions, which took place virtually on April 13, 2021. Thereafter, Sharing Hope submitted a supplemental memorandum as requested by the Trial Court on April 16, 2021. [ROA ___; Memoranda filed April 16, 2021, and Reply filed April 19, 2021.]

In connection with these motions, Sharing Hope provided designated documents under seal for the Trial Court's in camera review. Thus, while there are several motions involved in this appeal, the same legal issue is involved in each of them – whether Sharing Hope's retrospective, self-critical peer review activities are protected from discovery.

The Trial Court granted the November 18th Motion to Compel against Sharing Hope, denied the Motion to Compel against MUSC, and denied Sharing Hope's Motion for a Protective Order. [ROA ___, ___; Form 4 Order, April 13, 2021, Order, filed April 29, 2021.] The result of these Orders is that Sharing Hope was ordered to produce all of its peer review materials and to direct the witness to answer questions regarding the peer review documents, while many of the same materials which were in MUSC's possession were protected.

Sharing Hope timely served and filed a notice of appeal from the April 29, 2021 Order pursuant to S.C. Code § 44-7-394[4] and Rule 203, SCACR. [ROA ___; NOA, served May 5, 2021.]

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[3] The issue of the peer review privilege was also raised by UNOS, who has filed a separate appeal. The appeals have been consolidated, but UNOS will present its arguments in its own brief.

[4] While discovery orders generally are not immediately appealable, see S.C. Pub. Serv. Auth. v. Arnold, 287 S.C. 584, 586, 340 S.E.2d 535, 536 (1986), § 44-7-394 specifically authorizes

STATEMENT OF THE FACTS

The details of the procurement and management of the deceased Donor's organs and the Patient's medical treatment are not pertinent to the legal issue presented on appeal regarding the peer review privilege. Rather, the key facts related to the privilege issues at bar are found in the operation of the national Organ Procurement and Transplant Network (OPTN) and the roles of UNOS, its administrator, the OPOs and the various donor and transplant hospitals within the OPTN. Sharing Hope's role as an OPO and the nature of its post-incident quality assurance review – activities required by UNOS – are essential to an understanding of why the documents created in that peer review process should be recognized as privileged under South Carolina law.

Overview of Organ Procurement and Transplant Network as a Critical Participant in the Healthcare Field of Organ Transplants

During the middle of the 20th Century, medical science accomplished important breakthroughs in the field of organ transplantation when the first successful kidney transplant was performed in 1954, and then the first successful heart transplant was performed in 1967. While the scientific advances in organ transplantation provided opportunities to save and prolong many lives, those opportunities were hindered by an inadequate supply of available organs. This spurred enactment of legislation at both the state and federal levels to address issues related to obtaining valid consents for anatomical gifts (organ donation) as well as managing collection and distribution of the donated organs.[5]

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immediate appeal of a court order compelling production of documents protected under the peer review privilege of § 44-7-392; and also, provides that the filing of the appeal automatically stays the enforcement of the order compelling the production.

[5] On the state level, the National Conference of Commissioners on Uniform State Laws presented the Uniform Anatomical Gift Act of 1968 (UAGA) which was drafted with the primary purpose to increase the supply of organs. The UAGA served as a guideline for state laws on principles and procedures dealing with the determination of death, the "gifting" of organs by the donor or

At the federal level, Congress enacted the National Organ Transplant Act in 1984. Pub. L. 98-507, codified as amended at 42 U.S.C. § 273 et seq. (2021) (the Act). The Act directed the Secretary of Health and Human Services (HHS) to create and operate the Organ Procurement and Transplant Network (OPTN) for the purpose of establishing a national organ transplant infrastructure, including maintaining a list of individuals in need of such transplants and facilitating an equitable nationwide distribution of organs among transplant patients. 42 U.S.C. § 274(a), (b)(1)(A)-(B), (b)(2)(D). HHS also has implemented rules/regulations establishing a regulatory framework for the structure and operations of the OPTN. 42 CFR §§121.1 et seq.

The OPTN is a membership organization designed to be "operated by the transplant community ... with oversight by HHS." Final Rule for the Organ Procurement and Transplantation Network, 63 Fed. Reg. 16,296, 16,197–98 (proposed Apr. 2, 1998) (codified at 42 C.F.R. pt. 21 (2021)). The OPTN is governed by a Board of Directors, and its membership includes OPOs, transplant hospitals, and other institutions or individuals with an interest in organ donation. 42 C.F.R. § 121.3. The Act called for the OPTN to be administered by a private, non-profit organization under federal contract. UNOS, a Virginia private non-profit organization, was awarded the OPTN contract in 1986 and has operated the OPTN continuously since then. See United States v. United Network for Organ Sharing, C/A No. 03 C 2295, 2002 WL 1726536, 2002 U.S. Dist. LEXIS 8878 (N.D. Ill. May 17, 2002) (discussing the 1986 contract between HHS and UNOS).

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those with authority his/her behalf; and the receipt of an anatomical gift by a transplant patient. Over time, the UAGA has been revised, and a version or revision of the UAGA has been adopted by all 50 states and the District of Columbia. South Carolina adopted its version of the 1968 UAGA in 1969; S.C. Acts 1969 (56) 625; 1962 SC Code § 32-717. The act has been amended and the current version is found in S.C. Code §§ 44-43-310 et seq.

The OPTN, as administered by UNOS, establishes policies which govern the allocation of transplantable organs nationwide; collects clinical data on all transplant candidates and organ donors in the United States; establishes a network of membership requirements for transplant hospitals and OPOs; and monitors their compliance with the established standards, policies, and transplant quality.[6]

Sharing Hope's Unique and Essential Role as South Carolina's Organ Procurement Organization

An OPO facilitates the delivery of life-saving organs to individuals on organ transplant lists. As part of their essential role in the OPTN, an OPO evaluates potential organ donors and serves as a conduit to provide information regarding the donor to transplant centers. When a donor is declared brain dead, the OPO oversees the donor's body to maximize organ function for optimum organ recovery in preparation for donation. In this role, the OPO gathers the donor's pertinent medical information provided by the donor hospital and outside laboratories[7] which it then uploads into a database maintained by UNOS. It also coordinates the logistics for organ recovery with the donor hospital and the transplant surgeons.

Federal law requires OPOs to be members of the OPTN. 42 C.F.R. § 121.3(b). An entity becomes an OPO by demonstrating its qualifications to the Secretary of HHS and thereafter being designated as a particular region's OPO by the Secretary or her delegee. 42 U.S.C. § 1320b-8. Only one OPO may be designated for each service area. § 1320b-8(b)(2). In order to be designated as a particular service area's OPO, an entity must meet certain qualifications and requirements as outlined in the law, including certification by the Secretary of HHS. See 42 U.S.C. § 273. Sharing

[6] https://optn.transplant.hrsa.gov/members/member-actions/.

[7] Sharing Hope is not a laboratory and relies on the donor hospital and outside laboratories to provide information and testing for the donor.

Hope has been designated as the OPO for South Carolina and certified by HHS. In order to serve as the OPO for South Carolina, Sharing Hope must meet and abide by OPTN policies, procedures, standards and requirements as administered by UNOS.

Self-Critical Quality Assurance and Peer Review Evaluations Required by the OPTN

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.[8] The MPSC conducts peer review of OPTN members and reviews events identified as a risk to patient safety, public health, or the integrity of the OPTN. The OTPN Bylaws include the following provision regarding Medical Peer Review:

> The OPTN will conduct all deliberations and take all actions according to applicable medical peer review laws. Consistent with applicable laws, all inquiries, deliberations, recommendations, and actions during member reviews by the OPTN will be kept confidential. All proceedings and records within the scope of these OPTN quality review activities are confidential. Members of any OPTN Committee attending the meeting in which a peer review is conducted, serving as a peer reviewer, working for or on behalf of the OPTN, or providing information to the OPTN for peer review activities, are entitled to confidentiality.
>
> The OPTN will keep all materials, information, and correspondences to and from members and directly related to the OPTN peer review process confidential to promote quality improvement and full disclosure by OPTN members. Materials, information, and correspondences created by or for the peer review body are considered "directly related."
>
> The OPTN will not disclose any materials provided to the OPTN by the member, except as required by law. Materials prepared by members independent of the OPTN medical peer review process may be shared by members in their discretion.

[8] See generally https://optn.transplant.hrsa.gov/members/committees/membership-and-professional-standards-committee/.

Bylaws L.3, Medical Peer Review.[9]

Sharing Hope's Self-Critical Quality Assurance and Peer Review Evaluations at Issue in this Appeal

Sharing Hope and UNOS' MPSC engaged in a retrospective, self-critical quality assurance and peer review evaluation regarding the Patient's double lung transplant following his death. This peer review included consideration of Sharing Hope's collection and reporting of the Donor's medical information and the identification of the Patient as a match for the Donor's organs. Again, the underlying factual information involving the transplant, including Sharing Hope's contemporaneous records and communications regarding the evaluation of the Donor and the transplant process, have been produced and are not at issue in this appeal. It is the communications and materials created after the transplant as part of UNOS' mandatory peer review process which are at issue in this appeal. Sharing Hope has withheld as privileged materials and communications generated during its peer review and has identified the same on its privilege log (as amended). Specifically, the withheld materials consist of documents and correspondence exchanged between Sharing Hope (the South Carolina OPO) and the MPSC (the committee established by UNOS as part of its administration of the OPTN) while these entities engaged in their confidential peer review process. To the extent that these communications contain attachments or enclosures of the Donor's medical records, standard operating policies of Sharing Hope, or other records kept in the ordinary course of business, such materials have already been separately produced to the Plaintiff.

Sharing Hope also engaged in a root cause analysis[10] with the donor hospital, Grand Strand Medical Center, which was conducted to study the Patient's death in order to identify the root

[9] https://optn.transplant.hrsa.gov/media/1201/optn_bylaws.pdf.

[10] 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

causes towards a goal of improving patient safety protocols. One of the documents in issue [Privileged 0187-0195] was prepared and shared with Grand Strand in connection with this root cause analysis.

Additionally, Sharing Hope has instructed its employees not to answer questions during depositions regarding these protected activities.

ARGUMENT

Post-incident, self-critical materials prepared or exchanged by an Organ Procurement Organization pursuant to a requirement of the federal Organ Procurement Transplant Network should be protected by a peer review privilege.

STANDARD OF REVIEW

The trial court's determination of whether or not a communication is privileged and confidential will not be overturned on appeal absent an abuse of discretion. Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 292, 692 S.E.2d 526, 529 (2010). An abuse of discretion occurs when the judge's ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support. Renney v. Dobbs House, Inc., 275 S.C. 562, 564, 274 S.E.2d 290, 291 (1981); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987); 16 S.C. Jur. Appeal and Error § 124. Questions of law are subject to de novo review on appeal. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

INTRODUCTION TO ARGUMENT

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

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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.

schema is novel question of law. The Trial Court refused to recognize Sharing Hope's right to a peer review protection based on its narrow interpretation of the applicable state statutes despite the imperative public policy objectives as soundly stated in long-standing caselaw.

Sharing Hope has properly asserted a peer review privilege to materials, described on the privilege log and provided to the court for in camera review, under the applicable peer review statutes found in South Carolina and Virginia law, and the mandatory peer review policies adopted by the federal OPTN, as administered by UNOS. Sharing Hope's assertion of peer review privilege also fully comports with the important objectives embodied in peer review protections extended on varied state and federal levels, including the express protections provided by the Patient Safety Quality Improvement Act of 2005, which should be extended in this case.

The importance of recognizing Sharing Hope's right to a peer review privilege is imperative where the peer review process is itself required by federal law and regulation, and where Sharing Hope's continued ability to serve as South Carolina's OPO requires compliance with UNOS' peer review process.[11] 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.

To require production of the peer review materials withheld by Sharing Hope would violate the clear, established public policy of promoting quality assurance efforts to improve patient care.

[11] 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.

Importantly, continuing to protect peer review materials does not restrict inquiring parties from learning the facts or information associated with the underlying medical event. Plaintiff is simply required to prove her claims using those facts and information, rather than relying on any retrospective evaluation conducted during a peer review designed to improve patient care. Rather than contravene the sound, appropriate and essential objectives of the peer review protection, the Plaintiff's Motions to Compel should be denied, and Sharing Hope's Motion for Protection should be granted.

I. SOUTH CAROLINA LAW[12] RECOGNIZES A PEER REVIEW PRIVILEGE FOR RETROSPECTIVE SELF-CRITICAL ANALYSIS IN THE HEALTHCARE FIELD.

The South Carolina Supreme Court has consistently restated the important public policy concerns in recognizing a peer review privilege in the healthcare field. In McGee v. Bruce Hosp. Sys., 312 S.C. 58, 62, 439 S.E.2d 257, 259 (1993), the Court found that "the public interest in candid professional peer review proceedings should prevail over the litigant's need for information from the most convenient source." In so holding, the Court articulated the "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. *See State ex rel Shroades v. Henry*, 187 W.Va. 723, 421 S.E.2d 264 (1992). 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.

[12] As a traditional rule, the substantive law governing a tort action is determined by the law of the state in which the injury occurred. Boone v. Boone, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001). On the other hand, under traditional choice of law, questions of privilege may be viewed as evidentiary and the law of the forum is applied. 1 McCormick On Evid. § 73.2 (8th ed.). Here, the question is complicated by the implications of the peer review requirements and confidentiality assurances of national-level organizations such as the OPTN, as administered by UNOS. Therefore, Sharing Hope addresses the law applicable to the state of its own incorporation (South Carolina) and the state of UNOS' incorporation (Virginia) along with relevant federal laws and policies.

312 S.C. at 62, 439 S.E.2d at 259. The Court further adopted the reasoning of an opinion of the Supreme Court of Florida in Cruger v. Love, 599 So. 2d 111 (Fla. 1992), on the importance of alleviating the participants' fear of detrimental consequences of candidly contributing to the peer review process:

> [t]he policy of encouraging full candor in peer review proceedings is advanced only if all documents considered by the committee ... during the peer review or credentialing process are protected. Committee members and those providing information to the committee must be able to operate without fear of reprisal. Similarly, it is essential that doctors seeking hospital privileges disclose all pertinent information to the committee. Physicians who fear that information provided in an application might someday be used against them by a third party will be reluctant to fully detail matters that the committee should consider.

McGee, 321 S.C. at 61–62, 439 S.E.2d at 259–60 (quoting Cruger, 599 So. 2d at 114).

The Supreme Court has continued to adhere to these policy statements as found in Durham v. Vinson, 360 S.C. 639, 647, 602 S.E.2d 760, 763 (2004), where the Court found that a trial court had erred by allowing plaintiff's counsel to use a defendant physician's assertion of a peer review privilege to portray the defendant as deceitful, stating: "Allowing this to occur does not serve the policy goals of promoting candor and open discussion among participants in the peer review process." 360 S.C. at 649, 602 S.E.2d at 765.

In furtherance of this policy, the South Carolina Legislature has enacted two statutes regarding peer review data. These enactments include the "old" peer review statute, found in § 40-71-20 (enacted in 1978), and the "new" statute, § 44-7-392 (enacted in 2012), both of which protect peer review materials from disclosure in civil actions.

Section 40-71-20(A) addresses peer review privilege in the context of proceedings conducted by a committee of a professional society:

> (A) 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 § 40-71-20. As referenced, § 40-71-10 refers to an appointed committee formed to maintain professional standards of a state or local professional society.[13]

Section 44-7-392 addresses peer review privilege in the context of proceedings conducted by a hospital:

> (A)(1) All 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 physician practices owned by the hospital (its parent or subsidiaries), relating to the following are confidential:
>
> > (a) sentinel event investigations or root cause analyses, or both, as prescribed by the joint commission or any other organization under whose accreditation a hospital is deemed to meet the Centers for Medicare and Medicaid Services' conditions of participation;
> >
> > (b) investigations into the competence or conduct of hospital employees, agents, members of the hospital's medical staff or other practitioners, relating to the quality of patient care, and any disciplinary proceedings or fair hearings related thereto;
> >
> > (c) quality assurance reviews;
> >
> > (d) the medical staff credentialing process;

[13] S.C. Code §40-71-10, defines professional society as follows:

> "Professional society" as used in this chapter includes legal, medical, osteopathic, optometric, chiropractic, psychological, dental, accounting, pharmaceutical, 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. It also includes the South Carolina Law Enforcement Accreditation Council.

> (e) reports by a hospital to its insurance carriers;
>
> (f) reviews or investigations to evaluate the quality of care provided by hospital employees, agents, members of the hospital's medical staff, or other practitioners; or
>
> (g) reports or statements, including, but not limited to, those reports or statements to the National Practitioner Data Bank and the South Carolina Board of Medical Examiners, that provide analysis or opinion (including external reviews) relating to the quality of care provided by hospital employees, agents, members of the hospital's medical staff, or other practitioners; or
>
> (h) incident or occurrence reports and related investigations, unless the report is part of the medical record.

The Trial Court held that neither statute provided a privilege to the UNOS-Sharing Hope peer review process because Sharing Hope is not an "appointed committee" or a hospital within the bare language of these statutes. [ROA ___; Order.] However, UNOS-Sharing Hope peer review process should be protected under § 40-71-20, contrary to the Trial Court's ruling.

The federal OTPN is an organization of which Sharing Hope is a member OPO, and UNOS (the OPTN's administrator) has appointed a standing Membership and Professional Standards Committee (MPSC) to conduct peer reviews of OPTN members. UNOS has adopted By-Laws requiring the maintenance of confidentiality for its peer review activities, and UNOS' MPSC conducts peer reviews and investigations pursuant to the same. Both Sharing Hope and the MPSC should be considered "appointed committees" such that the peer review protection provided by § 40-71-20 applies. The mere fact that the particular peer review process at issue involves the OPTN and a member OPO should not erode the propriety and necessity of providing robust protection of peer review processes from discovery.

In reading the statutory language so rigidly to exclude the UNOS-Sharing Hope peer review process, the Trial Court has restricted the peer review privilege so narrowly that it

contravenes the well-established public policy without any rational basis. While the precise circumstances of the organizational structure of these healthcare entities may be unique, the policy concerns remain the same: confidentiality is the core of the peer review process, and if disclosure of peer review information can be compelled, the foundation of any entity's peer review process will be severely compromised. If there is no confidentiality, then OPOs and their staff may be hesitant to candidly participate in the process or simply refuse to participate at all; and such lack of cooperation will hinder the OPTN's efforts to improve patient safety and availability of viable donor organs. Such a result would be particularly troubling in light of the undeniable expectation of confidentiality and privilege for this process provided in UNOS' By-Laws, quoted above.

In addition, Sharing Hope, as the OPO for South Carolina, operates in cooperation and conjunction with both the donor and transplant hospitals and, in fact, an OPO is the essential link in facilitating the donation and transplant of lifesaving organs. It is entirely illogical for donor and transplant hospitals, such as Grand Strand and MUSC, to enjoy peer review protection for their retrospective, post-incident analyses while the same protection is not afforded to the OPO. This is particularly true when these entities are necessarily involved in the exchange of information and may even participate in portions of each other's peer review processes. Yet, that is precisely what occurred at the trial level in this case.

As discussed below, protecting the materials created and communications exchanged by Sharing Hope for UNOS' mandatory peer review analysis would fully comport with clearly established public policy and spirit of these peer review statutes, while denying the OPO the protection of a privilege would be a detrimental disservice to the federal network that is the exclusive source of organ procurement for patients in need of a lifesaving organ transplant.

II. LONGSTANDING, WELL-ESTABLISHED PUBLIC POLICY SUPPORTS RECOGNITION OF A PRIVILEGE TO PROTECT PEER REVIEW MATERIALS.

Statutory Construction – To Effectuate Legislative Intent and Public Policy Goals

As noted by the Trial Court, the primary purpose of statutory construction is to determine and effectuate the intent of the Legislature. Charleston Cty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). To that end, one of the corollary rules of statutory construction is that legislative intent should be ascertained, by first looking to the plain language of the statute. However, the plain language rule does not presuppose that the courts should ignore the recognized intent of the Legislature. "[T]he purpose of an enactment will prevail over the literal import of the statute." Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000).

"A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of the words." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) (citations omitted); See also Enos v. Doe, 380 S.C. 295, 304, 669 S.E.2d 619, 623 (Ct. App. 2008); Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 232, 612 S.E.2d 719, 724 (Ct. App. 2005). The court should not consider a particular clause in isolation but should read it in conjunction with the purpose of the whole statute and the underlying public policy. S.C. Coastal Council v S.C. State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). Considerations of public policy undergird all legal proceedings, such that the law will not support an outcome which contravenes the public interest. The rule of statutory construction of statutes pertaining to public policy is strong. "When a statute is a part of other legislation, designed as a whole to establish an expressed state policy, the court should strive to effectuate that policy." Gregg Dyeing Co. v. Query, 166 S.C. 117, 123, 164 S.E. 588, 590 (1930).

Another rule of statutory construction aims to avoid absurdities. When application of the plain language "rule" would result in a distinction for which there is no logical basis or lead to an absurd result that could never that been intended by the Legislature, the court may construe the statute so as to effectuate the public policy underlying the legislative intent. See S.C. State Bd. of Dental Examiners v. Breeland, 208 S.C. 469, 480, 38 S.E.2d 644, 650 (1946) (citing State v. Gilliam, 208 S.C. 126, 37 S.E.2d 299, 301 (1946)); see also State v. Prince, 335 S.C. 466, 476, 517 S.E.2d 229, 234 (Ct. App. 1999) (rejecting interpretation as illogical and contrary to public policy). The court can, and should, refuse to construe a statute so that it is illogical and unreasonable and would lead to an obviously unintended result. Breeland, 208 S.C. at 481, 38 S.E.2d at 650. The court can, and has, interpreted a statute to accomplish legislative intent despite a contrary literal meaning of the statutory language "where there has been an oversight by the legislature that is clearly in conflict with the overall intent of the statute." Hodges v. Rainey, 341 S.C. at 87, 533 S.E.2d at 582.

Where a statute is silent, courts will interpret it in a manner consistent with its stated purpose and within the breadth of the legislative schema. In the face of silence on a particular point, a court may reasonably expand the statute's application to fill the void in a manner consistent with its legislative purpose. S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control, 390 S.C. 418, 427, 702 S.E.2d 246, 252 (2010).

Here, the Trial Court was reluctant to look beyond the narrow language of the statutes, even while acknowledging the merit of the recognized public policy at issue. [ROA ___; Order p. 6.] However, this Court can, and should, construe the statutes to encompass these circumstances of Sharing Hope's peer review process, or recognize a common law privilege, to effectuate the

important public policy of encouraging peer review as important to optimum patient care and safety.

As discussed above, our Supreme Court has recognized the overriding public policy to promote complete candor and open discussion in peer review process. See discussion of McGee v. Bruce Hospital and Durhan v. Vinson, supra. While the statutes address a peer review privilege for hospitals and standards committees of professional associations, they may not directly address the circumstances presented here involving a peer review required by federal law uniquely applicable to the OPTN and conducted by UNOS' MPSC and a member OPO. The fact that the statutes do not directly speak to this singular, unique organization and its regional members does not automatically justify denying this OPO, Sharing Hope, protection of the same peer review privilege which is extended to the donor and transplant hospitals that form part of the organ transplant system where the "overriding public policy" to promote "complete candor and open discussion" in peer review process that are all essential to providing life-saving procedures.

The reality of legislation is that it necessarily is drafted in advance of, and therefore with imperfect appreciation for, the problems that may be countered in its application. Jack Schwartz & Amanda Stakem Conn, The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History, 54 Md. L. Rev. 432, 435–36 (1995). Where an issue was not reasonably envisioned, contemplated or addressed by a legislative body, it is the right and duty of the court to make rulings on issues not perfectly encompassed by statutes in a manner consistent with a state's public policy and the overarching objectives of the law.

It is highly unlikely that the state legislature specifically considered the activities of OPOs – nor any particular peer review process in which they might participate – when crafting the South

Carolina peer review statutes.[14] To the extent that the bare terms of the statutory language do not expressly encompass peer review materials produced in the mandated review process conducted between UNOS and its OPO, this can be seen as a case of legislative oversight, see Hodges, 341 S.C. at 87, 533 S.E.2d at 582, and the Court still has the ability, if not the responsibility, to extend the protection where the same vital public policy applies.

Further, Plaintiff herself has treated Sharing Hope and UNOS as health care providers in this case. For example, Plaintiff has complied with the South Carolina Tort Reform Act of 2005 Relating to Medical Malpractice (2005 Act No. 32, codified at S.C. Code § 15-79-110 et seq.) by providing a pre-suit Notice of Intent to sue for each of the named Defendants along with an affidavit of an expert witness purporting to identify each Defendants' alleged deviation from the standard of care. [ROA ___; Notice of Intent, Amd. Notice of Intent, & Notice of Intent as to Sharing Hope Employees.] It would be illogical to endorse an inconsistent treatment of Sharing Hope and UNOS versus the other health care providers involved in the organ donation process at issue in this suit.

[14] This is particularly likely for several reasons unique to the function of the OPTN and its member OPOs. First, the certification of OPOs and the creation of the regions they serve is dictated by the Department of HHS, rather than the states. It is entirely possible (and actually the case in some areas) that an OPO may operate across several states while being incorporated in only one. For example, the New England Organ Bank is the federally designated OPO for Region 1, which covers the states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Bermuda, and portions of Vermont. See generally https://optn.transplant.hrsa.gov/members/regions/region-1/ and https://neds.org/our-opos/. Additionally, given that the protections of the Uniform Anatomical Gift Act, as adopted in South Carolina, provide immunity for entities acting in good faith in the procurement and/or facilitation of organ transplants, it is unlikely that an OPO operating within the state would be identified as an entity in need of express acknowledgement in the peer review statutes. *See* S.C. Anatomical Gift Act, S.C. Code § 44-43-385 (2021).

Common Law and Statutory Development of the Peer Review Privilege - Nationwide

From its first recognition, the peer review privilege has been a product of judicial creation. The self-critical analysis privilege was first addressed in the seminal opinion in Bredice v. Doctor's Hosp., Inc., 50 F.R.D. 249, 250 (D.D.C. 1970), aff'd, 479 F.2d 920 (Table) (D.C. Cir. 1973), where a federal district court held that a medical malpractice plaintiff could not obtain the minutes and reports of a hospital medical staff meeting aimed at improving in its procedures and treatments for patient safety. In so holding the court considered several factors, including the objective of the peer review process, the obligatory nature of participation in the process, the assurance of confidentiality as essential to full and effective participation, and the lack of relevancy.

In Bredice, the court considered the fact that the medical staff review was conducted pursuant to the requirements of the Joint Commissions on Accreditation of Hospitals which entail JCAHO requires staff meetings "to review, analyze, and evaluate the clinical work of its members" towards "the 'sole objective' of such staff meetings is the 'improvement' in the available care and treatment." 50 F.R.D. at 250. The court accepted/acknowledged that such retrospective self-analysis served a valuable function in improving medical care:

> The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be opened to the discovery process. *Id*.

The court also reflected upon the fact that the retrospective self-improvement process is not relevant to the facts of the actual treatment provided to the patient/plaintiff. *Id*. at 251.

Another factor noted by the Bredice court was that the staff committee work was performed "with the understanding that all communications originating therein are to be confidential." *Id.* at

250. The court recognized the critical need for assurance of confidentiality in peer review processes:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit. *Id.*

The Bredice court appreciated that healthcare providers bear an immense responsibility for life and death decisions in patient healthcare and they need to engage in opportunities to learn through self-evaluation, stating: "There is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded." *Id*. at 251. Ultimately, the court concluded that the overwhelming public interest was a sufficient basis to recognize a qualified privilege for retrospective peer review processes aimed at self-improvement. Under the same reasoning, the UNOS peer review with its designated OPO, being retrospective with the purpose of self-improvement, should be entitled to a privilege to serve the overwhelming public interest in promoting optimum patient health and safety.

Persuasive authority in Hofflander v. St. Catherine's Hospital, Inc., 635 N.W.2d 13 (Wis. App. 2001), *aff'd in pertinent part*, 664 N.W.2d 545 (Wis. 2003), also supports extension of the protection to the confidential medical peer review between UNOS and Sharing Hope. In Hofflander, the court extended statutory peer review confidentiality to JCAHO records based on public policy, finding that JCAHO performs functions equivalent to a peer review committee and that allowing discovery of its reports would discourage hospitals from seeking accreditation and depriving them of an impartial and objective review of the services they provide. By the same reasoning, the UNOS Membership and Professional Standards Committee performs functions

comparable to a medical society professional standards committee and conducts peer review proceedings that are the equivalent of a root cause analysis or quality assurance under §40-71-20 and §44-7-392. Allowing discovery of Sharing Hope's self-critical analysis materials could discourage the OPO from candid participation in the UNOS peer review process and deprive the federal OPTN of the invaluable benefit such self-analysis provides for the betterment of the organ transplant field.

Each of the fifty states have acknowledged the public policy supporting a peer review privilege: "The legislatures in every state in the Nation have concluded that without a peer review privilege, physicians will be discouraged from participating in the full and frank expression of opinion that is essential if peer review is to fulfill its vital role in advancing the quality of medical care." Sevilla v. United States, 852 F. Supp. 2d 1057, 1060 (N.D. Ill. 2012). Consequently, all fifty States and the District of Columbia recognize a form of medical peer review privilege or protection. Francis v. United States, C/A No. 09 Civ. 4004 (GBD)(KNF), 2011 WL 2224509, at *6, 2011 U.S. Dist. LEXIS 59762, at *18 (S.D.N.Y. May 31, 2011). Of note, it appears that only the Illinois statute has language that expressly extends a peer review privilege to an organ procurement agency (along with an extensive listing of other health care entities/groups). 735 Ill. Comp. Stat. Ann. 5/8-2101.[15] However, these statutes share a common purpose in encouraging frank and candid discussion of medical events by eliminating the fear that peer review information will be used against the participants in subsequent litigation. Francis, *id*. (citing K.D. ex rel. Dieffenbach v. United States, 715 F. Supp. 2d 587, 597 (D. Del. 2010)).

[15]In Watson v. LifeShare Transplant Donor Servs. of Oklahoma, Inc., No. CIV-09-979-M, 2011 WL 3648389, at *2 (W.D. Okla. Aug. 18, 2011), a federal district court held that an incident report prepared by an OPO for UNOS was protected by a Oklahoma peer review privilege statute that provided peer review privilege to a "health care facility." This appears to be the only reported decision involving an OPO peer review privilege.

Federal law also recognizes the essential function of the peer review process and protects the same. For example, in 2005 Congress enacted the Patient Safety Quality Improvement Act which has been largely seen as an announcement of "a more general approval of the medical peer review process and more sweeping evidentiary protections for materials used therein." Dieffenbach, 715 F. Supp. 2d at 597. Its purpose is to "encourage a 'culture of safety' and quality in the U.S. health care system by providing for broad confidentiality and legal protections of information collected and reported voluntarily for the purposes of improving the quality of medical care and patient safety." S. Rep. No. 108-196, at 3 (2003). Recognition of a peer review privilege for the OPO in this case would be in line with the nationwide acceptance of the important public policy to promote efforts for better patient care and safety and the vital role of self-critical analysis in effectuating that policy goal.

Judicial recognition of a peer review privilege would also comport with federal and state jurisprudence on the common law recognition of privileges. For example, U.S. Supreme Court has noted that while our legal system has a fundamental premise that the public has a right to every man's evidence, exceptions in the form of privileges may be justified by a transcending public good. Jaffee v. Redmond, 518 U.S. 1, 9 (1996). An asserted privilege may be granted where it is grounded in an essential need for confidence and trust, and it must serve an important public interest. *Id*. at 11. In Jaffe, the Court extended a recognized privilege that protects confidential communications between psychiatrists and psychologists and their patients to also protect confidential communications made to social workers:

> We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker

Id. at 15. By the same reasoning, the peer review privilege that covers peer review by professional associations and hospitals should apply with equal force to the exclusive federal organ procurement schema. As widely acknowledged, the peer review privilege is grounded in a need for confidence and trust to promote candor in the retrospective self-analysis processes that serve an overriding public interest in improving patient care and safety. There is no logical justification for granting a peer review privilege to the hospitals involved in the transplantation field of medicine and denying the same privilege to the OPOs that hold an essential role in that same field.

In Hartsock v. Goodyear Dunlop Tires N. Am. Ltd., 422 S.C. 643, 649, 813 S.E.2d 696, 698-99 (2018), our own Supreme Court undertook an analysis of how privileges are recognized in South Carolina, stating that: "The principle underlying recognition of a privilege is simple and cited the U.S. Supreme Court's decision in Jaffe by quoting therefrom:

> [A]lthough the public "has a right to every man's evidence," an exception may be justified 'by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" "[A]n asserted privilege must also 'serv[e] public ends.'"

The Hartsock Court also noted that "our evidentiary privileges are provided through an assortment of sources: the South Carolina or United States Constitution, the common law, or a statutory provision." *Id*. at 699.

The Legislature's failure to address the question of applying the privilege to a peer review process undertaken by a unique federally-designated entity such as UNOS and its federally-certified OPO does not preclude the Court from recognizing one, as a matter of interpretation or a matter of common law. A peer review privilege is undeniably necessary in these circumstances because confidentiality is essential to the efficacy of the process of retrospective self-analysis and the privilege will serve the public good by ensuring/promoting patient safety.

As one commentator has noted, courts should not be reticent or hesitant to rule in support of the public policy goals that serve as the foundation of the privilege of self-critical analysis, stating: "Only through such developments will the privilege of self-critical analysis properly perform its function." The Privilege of Self-Critical Analysis, 96 Harv. L. Rev. 1083, 1100–01 (1983). If the Court does not apply the peer review privilege to the self-critical analysis in which Sharing Hope engaged after the Patient's unfortunate death, the purpose of the peer review privilege will be thwarted at the cost for potentially detrimental harm to the vital operation of the UNOS Network and its designated OPO in cooperation with the donor and transplant hospitals.

III. VIRGINIA LAW PROVIDES A PEER REVIEW PRIVILEGE TO THE MATERIALS CREATED BY SHARING HOPE TO MEET THE REQUIREMENT OF A VIRGINIA ENTITY.

The documents sought to be protected are the result of peer review required by UNOS, a Virginia non-profit organization, Virginia law is instructive and may be equally appliable. [See footnote 8.] UNOS would be held to the Virginia law and as discussed below, the documents designated as Privileged 0001-0186, 0196-0210, 0211-0223, and 0224-0227 would also fall under protection of the Virginia statutory scheme.

Virginia provides protection for the proceedings, minutes, records or reports of any quality assurance, quality of care, or peer review committee adopted by a national professional association of health care providers or Virginia chapter of a national professional association of healthcare providers. Va. Code Ann. § 8.01-581.17(B)(c) (Lexis, 2021). UNOS qualifies as such an organization. Va. Code Ann. § 8.01-581-1 (Lexis, 2021). This protection is further extended to all communications, both oral and written, originating in or provided to such committees or entities. *Id*. The materials and communications identified in Virginia's peer review statute are privileged and are not subject to disclosure in discovery unless a circuit court, after a hearing and for good

cause arising from extraordinary circumstances being shown, orders the disclosure of the proceedings, minutes, records, reports, or communications. *Id*.

There is one statutory exception to this Virginia rule: oral communications regarding a specific medical incident involving patient care and made within 24 hours of the specific medical incident are not protected by the peer review statute. *Id*. However, none of the materials withheld by Sharing Hope were generated within the 24-hour period following Mr. Holliman's death.

The documents withheld as privileged were generated in furtherance of the activities of quality assurance, quality of care, and for a peer review committee, the MPSC. This satisfies the threshold requirement of Va. Code Ann. § 8.01-581.17(B). Thus, Virginia's peer review privilege is applicable and prohibits the production of the withheld materials. Moreover, these materials are not the type generated in the ordinary course of business, such as incident reports or other contemporaneous documentation. Such materials have already been produced in this case and, indeed, are not protected by Virginia's peer review statute. Riverside Hosp., Inc. v. Johnson, 636 S.E.2d 416, 423–24 (Va. 2006). Analogous with South Carolina law, factual patient care does not reflect committee discussion and as discussed above, the medical records and policies contained within the peer review designated documents were produced to the Plaintiff in this case.

IV. SHARING HOPE'S PARTICIPATION IN THE ROOT CAUSE ANALYSIS CONDUCTED WITH GRAND STRAND HOSPITAL IS PROTECTED BY § 44-7-392.

As set forth above, the "new" peer review statute adopted in 2012 provides peer review protection to hospitals for root cause analyses required for accreditation, and for quality assurance reviews. S.C. Code § 44-7-392(A)(1)(a) and (c). After the transplant patient's death, the donor hospital, Grand Strand, and Sharing Hope participated a self-critical analysis that constitutes a root cause analysis and/or quality assurance review as contemplated by the statute. Sharing Hope participated in the protected process and created eight pages [Privilege log numbered 0187-0195]

as a result of a root cause analysis meeting between the two entities. The designation as "Root Cause Analysis" is found on the face of these documents.

Sharing Hope employee Ms. Welker attended Grand Strand's quality meeting on behalf of Sharing Hope to participate in the after-event self-critical analysis. During Ms. Welker's deposition, counsel for Sharing Hope directed her not to answer questions regarding the contents of the Root Cause Analysis on the basis of the peer review privilege.

The Trial Court held that these root cause documents, and questions posed to Ms. Welker during her deposition, are not protected by § 44-7-392 because they fall into the exception found in § 44-7-392(3), which reads: "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." (Emphasis added). However, Sharing Hope maintains that the Root Cause Analysis contains self-critical, retrospective analysis which goes beyond the facts and original source information regarding the Patient's transplant and, as such, this material and any testimony regarding the same should be protected by peer review.

This exception to the privilege allowing production from an original source is intended to allow testimony from and/or production of evidence regarding the patient care that is within that person's personal knowledge. However, while raw materials of purely factual medical information and historical factual events may be obtained from an "original source," the very purpose of the peer review privilege is to protect evaluative and deliberative materials created and/or gathered by a health care provider. *See* The Privilege of Self-Critical Analysis, 96 Harv. L. Rev. 1083, 1093 (1983) ("Courts currently interpret the privilege of self-critical analysis to protect the evaluative but not the factual portions of self-analyses."). See also In re Living Centers of Texas, Inc., 175

S.W.3d 253, 258 (Tex. 2005); Beth Israel Hosp. Ass'n v. Bd. of Registration in Med., 401 Mass. 172, 183, 515 N.E.2d 574, 580 (1987). As noted above, Plaintiff has already obtained the factual material and contemporaneous documentation and communication regarding the Patient's transplant along with the donor's records and various other non-privileged material from Sharing Hope.

The Trial Court's interpretation of this exception to privilege is wholly incompatible with the public policy that undergirds the privilege in the first instance. As discussed above, public policy supports recognition of a peer review privilege as necessary to promote full candor and open discussion among the participants in the peer review process. The policy would be contravened if documents from the peer review process are only protected from production by the hospital and allows those participating with the hospital to be forced to produce same evaluative and reflective documents because they retained copies in their possession. What participant would willingly be open and honest in a self-critical review while knowing that they would be subject to discovery production and deposition questions? It is reasonable to contemplate that the Trial Court's interpretation and application of this other/original source provision will greatly harm the efficacy of such comparable peer review efforts. The logical conclusion in the context of the public policy is to limit the other source exception to factual materials, and to protect the eight-page evaluation document that Sharing Hope created in connection with Grand Strand's root cause analysis (and limit related questions posed to the OPO staff).

CONCLUSION

For the foregoing reasons, the Trial Court's order should be reversed.

Respectfully submitted,

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August 2, 2021

RECEIVED
Aug 03 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

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

Respondent,

v.

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

Defendants,

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

Appellants.

Certificate of Service

The undersigned certifies that on this **2nd** day of **August 2021**, a copy of the Initial Brief and Designations on behalf of Appellant We Are Sharing Hope SC were served by emailing a copy of each, on the following counsel at the addresses listed below:

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August 2, 2021

Via U.S. Mail & E-Filing
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Michelle Cha Holliman, individually and as personal representative of the estate of Allen B. Holliman, Respondent v. We Are Sharing Hope SC, Medical University of South Carolina, United Network for Organ Sharing, Jacqueline Honig, M.D., and Darla Welker, Defendants, of which We Are Sharing Hope SC and United Network for Organ Sharing are the Appellants
C/A No. 2020-CP-10-02902, Charleston CP
Appellate Case No. 2021-000487
HLF File No. 269.009

Dear Ms. Kitchings:

Enclosed please find the Appellant We Are Sharing Hope's Initial Brief and Appellant We Are Sharing Hope's Designation of Matters to Be Included in the Record on Appeal in the above captioned matter. Also, enclosed herewith is the Certificate of Service. We were having technical issues trying to e-file these documents and will try again tomorrow, August 3, 2021. I am serving all other counsel of record by emailed copy of this letter.

Kind regards,

Yours truly,

/s/ Molly H. Craig

Molly H. Craig

MHC/mde
Enclosure
cc: John C. Moylan, III, Esquire [***Via E-Mail***]
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