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 Case No: 2021-000487

Trial Court Case 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.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

1. May We Are Sharing Hope SC and United Network for Organ Sharing appeal an interlocutory discovery order?

2. Did the circuit court correctly determine that We Are Sharing Hope SC is not entitled to claim peer review privilege under South Carolina law because it is not a covered entity under the plain language of the peer review statutes?

3. Did the circuit court rightly decline to expand the peer review privilege by creating a "public policy exception" where the Legislature chose not to do so?

4. Did the circuit court correctly conclude that South Carolina's peer review law governs whether documents and information of a South Carolina entity that is sued in South Carolina are privileged?

STATEMENT OF THE CASE

In an effort to delay this case from going forward, Appellants ask this Court to hear an improper interlocutory appeal of a circuit court's discovery order. This Court should decline that invitation.

This interlocutory appeal, if heard, presents a straightforward question of whether the circuit court correctly determined that We Are Sharing Hope SC ("WASH") is not entitled to claim peer review privilege under South Carolina law, either under the plain language of the statutes or through a judicially created public policy exception. After extensive briefing and a full hearing, the circuit court granted Mrs. Holliman's motion to compel and ordered WASH to produce documents and testimony withheld on a baseless claim of peer review privilege. WASH and United Network for Organ Sharing ("UNOS") now challenge the circuit court's ruling on appeal.

I. Factual Background

A. Introduction

This is a wrongful death case arising out of Allen B. Holliman's untimely death following a double lung transplant during which lungs of the wrong blood type were transplanted into him. WASH was the organ procurement organization ("OPO") that evaluated, procured, and distributed the donor lungs that Mr. Holliman received. (Complaint ¶¶ 23-24). As the OPO, WASH was responsible for accurately determining and reporting the donor's blood type. (Complaint ¶¶ 34, 43).

In connection with its duties as OPO, WASH ordered pre-transplant blood testing for the donor from VRL Eurofins ("VRL"). (Complaint ¶¶ 33, 43). VRL issued two reports for the donor to WASH, both of which stated that the Donor's blood type was indeterminate and discrepant—specifically, that the forward typing for the donor yielded type O results and the reverse typing yielded type A results. (Complaint ¶ 33). The hospital where the donor died, Grand Strand

Regional Medical Center in Myrtle Beach ("Grand Strand"), had also performed two blood typing tests for the donor in the course of its care for the donor as a trauma patient; these tests were not performed for the purposes of organ donation. (Pl.'s Mot. to Compel, Exhibit C, WASH's Resp. to Interrog. 9). Grand Strand's tests showed results of type O blood, but they were conducted using blood samples collected after the donor received a massive amount of un-crossmatched type O blood transfusions (the blood type that everyone can accept), and were, therefore, unreliable. (Pl.'s Mot. to Compel, Exhibit C, WASH's Resp. to Interrog. 9).

WASH used the Grand Strand's results to report the donor as having type O blood, without investigating the cause of VRL's indeterminate ABO results as required by WASH's own policies, and without consulting with Grand Strand's blood bank about its ABO results that were not obtained for the purpose of donation. (Complaint ¶¶ 33, 35, 43). In doing so, WASH ignored VRL's indeterminate and discrepant ABO results and labeled the donor as blood type O despite the absence of any reliable blood typing result based on a sample collected prior to the donor's receiving emergency blood transfusions. (Complaint ¶¶ 32-35).

Mr. Holliman, who had type O blood, was matched with the donor's lungs by UNOS. UNOS serves as the Organ and Transplant Network ("OPTN") for the United States under a contract with the federal government. (Complaint ¶¶ 9, 25). Mr. Holliman's physicians at the Medical University of South Carolina ("MUSC") transplanted the donor's lungs into him on November 27, 2018. (Complaint ¶ 21). Mr. Holliman began suffering serious complications during his transplant surgery and remained in critical condition afterwards. (Complaint ¶ 26). A few hours after the surgery was completed, another transplant hospital that received the donor's pancreas notified WASH that it had tested the donor's blood sample it received with the pancreas, and it discovered that the donor's blood type had been incorrectly reported as type O when it was actually

type A. (Complaint ¶¶ 17-19; Pl.'s Motion to Compel at 2-3). WASH relayed this information to MUSC, and, shortly thereafter, MUSC tested the donor's blood sample that WASH had given it with the lungs, which had been collected by WASH after the samples tested by VRL and Grand Strand. (Complaint ¶¶ 29; Pl.'s Mot. to Compel at 3). MUSC's test results from its blood sample confirmed that the donor in fact had type A blood. (Complaint ¶ 29). Neither WASH nor MUSC tested this blood sample prior to Mr. Holliman's transplant. (Complaint ¶¶ 34, 45).

Type A blood is incompatible with type O blood. (Complaint ¶ 30). Therefore, Mr. Holliman's physicians transplanted ABO incompatible lungs into him. (Complaint ¶¶ 31, 40). Mr. Holliman never gained consciousness after his transplant and died the very next day because his body rejected the donor's ABO incompatible lungs. (Complaint ¶ 31). UNOS matched Mr. Holliman with the ABO incompatible lungs that were transplanted into him and caused his death. (Complaint ¶¶ 25, 37-38).

B. WASH Withholds Documents on the Basis of Peer Review Privilege.

The appeal arises out of Appellants' assertion of peer review privilege with regard to 335 pages of documents in WASH's possession relating to Mr. Holliman's death, and information sought during deposition testimony. (WASH's Mem. in Opp. to Pl.'s Mot. at 4; WASH's Mot. for Protective Order at 1). WASH and UNOS contend that the documents and information withheld are privileged under at least one of the following statutes: S.C. Code Ann. § 44-7-392, S.C. Code Ann. § 40-71-20, or Va. Code. Ann. § 8.01-581.17 (B)(c). (UNOS App. Br. at 11-16; WASH App. Br. at 3, 16, 27-30).

WASH is the OPO for South Carolina and is located in Charleston, South Carolina. (WASH's Amended Answer ¶ 3; Complaint ¶ 2). WASH provides organ and tissue recovery services for every organ donor in South Carolina. (WASH Amended Answer ¶¶ 3, 5). WASH is

not a hospital, nor is it a hospital's parent, subsidiary, health care system, committee, or physician practice. (Order at 5). This is undisputed.

WASH is also not an appointed committee of any kind, and it is certainly not a committee appointed by a state or local professional society to maintain the professional standards of the society. (Order at 4). WASH does not have a majority of eligible licentiates in the area it serves, South Carolina, and, in fact, does not have more than a handful of professional licentiates of any type. (Order at 4). WASH, therefore, is not a state or local professional society or an appointed committee of such a society. *See* S.C. Code Ann. § 40-71-20 (A). WASH, instead, is a South Carolina non-profit organization conducting business as the OPO for South Carolina.

UNOS is also not a hospital, a parent or subsidiary of a hospital, health care system, committee, or physician practice. UNOS is the Organ Procurement and Transplantation Network ("OPTN") for the United States. (Order at 2). UNOS is responsible for managing the national transplant waiting list, matching donors to recipients, maintaining the database that contains the data for every transplant in the United States, and monitoring every organ match in the country, including Mr. Holliman's. (Complaint ¶¶ 10, 25).

UNOS is headquartered in Richmond, Virginia, and it is the only OPTN for the entire country. (Complaint ¶ 9). Because UNOS serves as the OPTN for the whole country (Complaint ¶ 9), it is not a state or local professional society. In fact, UNOS is not a professional society of any type because it is not a medical organization with a majority of eligible licentiates in the area it serves, which includes the entire United States. (Complaint ¶ 9).

II. Procedural History

Mrs. Holliman filed a Notice of Intent to File Suit against WASH on July 17, 2019,

pursuant to S.C. Code Ann. § 15-79-125.[1] (Notice of Intent to File Suit). On July 30, 2019, Mrs. Holliman issued a subpoena for relevant documents to WASH, as permitted by S.C. Code Ann. § 15-79-125 (B). (Pl.'s Mot. to Compel at 3). Beginning its efforts to delay the progress of this case, WASH refused to produce any documents until ordered to do so by the Court. (Pl.'s Mot. to Compel at 3). WASH claimed it could not produce the subpoenaed documents because of privacy concerns, but it also refused to consent to the entry of any confidentiality order to address those purported concerns. (Pl.'s Mot. to Compel at 3). WASH filed a motion to quash, which was denied by the circuit court on July 23, 2020. (Form 4 Order on Mot. to Quash). WASH finally responded to Mrs. Holliman's subpoena on August 7, 2020—more than a year after the subpoena was issued. (Pl.'s Mot. to Compel at 4). WASH provided a privilege log with its response indicating that 186 pages of documents were withheld from its production on a claim of "Peer Review, Quality Assurance/Quality Assessment." (Pl.'s Mot. to Compel at 4).

Mrs. Holliman filed her complaint against WASH, UNOS, and MUSC on July 9, 2020. (Complaint). Following the filing of her complaint, Mrs. Holliman served her first set of interrogatories and requests for production on WASH on July 10, 2020. (Pl.'s Mot. to Compel at 4). WASH served responses to Mrs. Holliman's discovery requests on August 28, 2020. (Pl.'s Mot. to Compel at 4). In its responses, WASH objected to numerous interrogatories and requests for production on the basis that they sought peer review materials. (Pl.'s Mot. to Compel at 4). Along with the discovery responses, WASH also provided an amended privilege log indicating that 195 pages of responsive documents were withheld on a claim of "Peer Review, Quality Assurance/Quality Assessment." (Pl.'s Mot. to Compel at 4). WASH later amended its privilege

[1] An amended Notice of Intent to File Suit was filed on April 7, 2020, to include UNOS and MUSC.

log multiple times. (Pl.'s Mot. to Compel at 4-5). According to WASH's fourth amended privilege log, WASH has withheld at least 335 pages of documents as peer review privileged. (Order at 2; Pl.'s Suppl. Mem. in Supp. of Pl.'s Mot. to Compel, April 16, 2021, at 1-2).

WASH has asserted a peer review privilege to requests for information related to, among other things, WASH's non-conformance report for Mr. Holliman's donor; communications between WASH and the Centers for Medicare & Medicaid Services ("CMS") relating to a complaint survey CMS conducted at WASH in May 2019, which resulted in a Statement of Deficiencies issued by CMS to WASH; and communications between WASH and CMS relating to Mr. Holliman or the donor whose mistyped lungs he received. (Pl.'s Mot. to Compel., Feb. 5, 2021, at 3). These documents and communications are all directly related to this wrongful death case arising out of WASH's mistyping of the blood type of Mr. Holliman's organ donor, and WASH should not be permitted to conceal this crucial evidence.

During the deposition of Ms. Welker, a key WASH employee and defendant, WASH's counsel instructed her not to answer questions relevant to the existence of the purported peer review privilege, such as the participants of allegedly privileged meetings and whether WASH has conducted any investigations into the fatal blood typing error at issue in this case. (Pl.'s Resp. in Opp. to WASH's Motion for Protective Order at 3; Order at 1-2). Shortly after the deposition, WASH filed a protective order regarding Ms. Welker's deposition. (WASH's Mot. for Protective Order).

Mrs. Holliman filed motions to compel WASH to produce documents withheld as peer review privileged on November 18, 2020, and February 5, 2021. (Pl.'s Mot. to Compel; Pl.'s Mot. to Compel., February 5, 2021). Prior to the scheduled hearing on Mrs. Holliman's motions to compel and WASH's motion for a protective order, WASH provided the withheld materials to the

circuit court for *in camera* review. (Order at 2). Subsequently, just one hour before the hearing with the circuit court, WASH provided an amended privilege log that identified, for the first time, an additional one hundred pages of documents withheld on a claim of peer review privilege. (Email from WASH's counsel attaching WASH's Fourth Amended Privilege Log ; Pl.'s Suppl. Mem. in Supp. of Mot. to Compel, April 16, 2021, at 6). The circuit court held a hearing on April 13, 2021, during which it carefully considered arguments presented by counsel for WASH, UNOS, and Mrs. Holliman. (April 13, 2021, Hearing Transcript). The court also permitted the parties to submit additional briefs, which they did. (Order at 1; April 13, 2021, Hearing Transcript at 15-16; WASH's Suppl. Mem. in Opp. to Pl.'s Mot. to Compel, April 16, 2021; UNOS' Mot. for a Protective Order/Mem. in Opp. to Pl.'s Mot. to Compel, August 16, 2021; Pl.'s Suppl. Mem. in Supp. of Mot. to Compel, April 16, 2021).

On April 29, 2021, the circuit court entered an Order granting the motion to compel filed by Mrs. Holliman against WASH and denying Appellants' motions for protective orders (the "Order"). (Order at 7). Specifically, the Order held that WASH was not protected by South Carolina's peer review statutes because, under the plain language of the statutes, WASH is not a hospital entitled to protection under S.C. Code Ann. § 44-7-392, nor is WASH an "appointed committee which is formed to maintain professional standards of a state or local professional society" covered by S.C. Code Ann. § 40-71-10 *et seq*. (Order at 4-5). The circuit court also ruled that WASH's documents and communications are not protected by peer review privilege, even if WASH shared documents with entities that were subject to the peer review statute, because such documents and information are still subject to discovery pursuant to the plain language of S.C. Code Ann. §§ 40-71-20 (A) and 44-7-392(A)(3). (Order at 5). Finally, the circuit court held that WASH's documents are not protected by peer review privilege under Virginia state law and federal

law and declined to invoke a public policy exception to extend the peer review privilege beyond the plain language of the statutes enacted by the South Carolina Legislature. (Order at 6).

Concerning the portion of the Order related to whether the circuit court should extend peer review privilege under a public policy exception, the circuit court stated:

> It is not this Court's place to change the meaning of a clear and unambiguous statute. 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 . . . . Upon careful review, this Court finds that Defendant We Are Sharing Hope is not entitled to 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 [sic] peer review privilege to new and unique entities.

(Order at 7) (citations omitted).

The circuit court directed WASH to produce, within 7 days, all of its documents withheld on a claim of peer review privilege and to reconvene the deposition of its employee, Ms. Welker, who had been improperly instructed not to answer questions during her deposition.[2] (Order at 7). WASH has not complied with the Order. Instead, in an effort to further delay this lawsuit, it has filed this interlocutory appeal. The circuit court carefully considered and rejected Appellants' arguments following a full hearing and extensive briefing. The Order is thorough and correct and should not be disturbed.

SUMMARY OF ARGUMENT

The first question before this Court is whether it should hear an interlocutory appeal of a circuit court's discovery order. Under South Carolina law and the precedents of its appellate

[2] Judge Cothran also examined South Carolina's peer review statutes to determine if Appellants can claim a privilege under them in connection with subsequent motions filed by Appellants regarding these same issues. Judge Cothran has indicated that he intends to grant Mrs. Holliman's motions to compel WASH and UNOS to produce documents previously withheld as peer review privileged and deny WASH's motion for a protective order. (Email from Judge Cothran's Law Clerk dated July 26, 2021).

Courts, the answer to that question is "no."

If this Court hears this appeal, the first step for any question of statutory interpretation is to review the plain language of the statute itself. In this case, it is also where the inquiry should end. South Carolina law recognizes two peer review privileges: a hospital peer review privilege and a professional society peer review privilege. These two statutes concerning peer review privileges are clear and unambiguous. S.C. Code Ann. § 44-7-392 provides protection for documents and information acquired in the course of certain hospital proceedings; S.C. Code Ann. § 40-71-20 protects data and information acquired by certain appointed committees of state or local professional societies. WASH is neither a hospital nor an appointed committee of a state or local professional society. Even if WASH shared or acquired information from a hospital or appointed committee covered by S.C. Code Ann. §§ 44-7-392 or 40-71-20, such documents and information are still subject to discovery from WASH pursuant to the plain language of the statutes. Finally, the circuit court correctly determined that this case is governed by South Carolina law because Mr. Holliman's ABO incompatible transplant and death occurred in South Carolina.

STANDARD OF REVIEW

The determination of whether a communication is privileged and immune from discovery is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances. *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980). The trial judge's decision will not be overturned 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 there is an error of law or a factual conclusion that is without evidentiary support. *Zabinski v. Bright Acres Assocs*., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). 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).

ARGUMENT

This Court should dismiss this appeal or uphold the well-reasoned Order of the circuit court. First, this is an attempt to appeal an interlocutory discovery order. Second, S.C. Code Ann. §§ 44-7-392 and 40-71-20 are plain and unambiguous, and they do not apply to WASH. Appellants' arguments in support of a public policy exception and adoption of Virginia peer review law strain credulity, and are a desperate attempt to delay this lawsuit and to shield crucial information related to the communications and investigation following Mr. Holliman's wrongful death.

I. Parties May Not Immediately Appeal Interlocutory Discovery Orders.

The circuit court's Order is not appealable at this time because it is an interlocutory decision, and the underlying case is ongoing. The circuit court ordered WASH to respond to Mrs. Holliman's discovery and provide deposition testimony previously withheld. (Order at 7). Under S.C. Code Ann. § 14-3-330, orders directing a party to participate in discovery are interlocutory and not directly appealable. *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); *Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405, 406 (2003) ("[W]e note an order compelling discovery does not ordinarily involve the merits of the case and may not be appealed."); *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005)("This discovery order is not a final order because it leaves some further act to be done by the court before the rights of the parties in an enforcement proceeding are determined."); *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) ("[T]he fact remains that discovery 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."); *Brown v. County of Berkeley*, 366 S.C. 354, 361, 622 S.E. 2d 533, 537 (2005) ("It is well settled that an

interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right.").

UNOS fails to cite any statutory law authorizing its immediate appeal of the interlocutory discovery order, and WASH claims its appeal is authorized by S.C. Code Ann. § 44-7-394. Section 44-7-394 (C) makes court orders immediately appealable only for a "hospital or affected person." Under the plain language of the applicable statutes, these Appellants are neither. WASH nor UNOS claim to be a hospital and could not credibly do so. Section 44-7-394 (B) explains that "[f]or purposes of this section an 'affected person' means a person, other than a patient, who is a subject of a proceeding enumerated in Section 44-7-392(A)(1)." Section (A)(1) in turn narrowly expands the definition of "affected person" to include:

> 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 . . . ."

S.C. Code Ann. § 44-7-392(A)(1)(emphasis added). Neither WASH nor UNOS are a hospital, a hospital parent, a hospital subsidiary, a health care system, a hospital committee, a hospital's governing body, or a physician practice. The lone exception in the statute that allows a hospital or a closely related entity to take an immediate appeal simply does not apply to WASH or UNOS.

Appellants are not entitled to appeal the circuit court's discovery order under any statute. Thus, the interlocutory Order is not appealable, and this appeal should be dismissed.

II. WASH is Not Entitled to Peer Review Privilege Under South Carolina's Clear and Unambiguous Peer Review Statutes.

There is no ambiguity in South Carolina's hospital and professional society peer review statutes. Consequently, those statutes must be enforced as written. The plain, unambiguous language of Section 44-7-392 applies to certain proceedings of ***hospitals***, or the hospital's

affiliated entities. "South Carolina's Legislature enacted S.C. Code Ann. § 44-7-392 to separately govern hospital peer review committees." *Howell v. Holland*, No. 4:13-cv-295-RBH-TER, 2014 WL 958277, at *2 (D.S.C. Mar. 10, 2014). WASH is not a hospital. (Order at 5). That fact is not in dispute. Because WASH is not a hospital, the circuit court correctly determined that WASH's documents and any knowledge Ms. Welker has about WASH's investigations related to this case are not privileged under Section 44-7-392.

WASH is also not subject to South Carolina's professional society peer review statute, S.C. Code Ann. § 40-71-20. Section 40-71-20(A) protects from discovery "data and information acquired by the committee referred to in Section 40-71-10 in the exercise of its duties . . . ." The committee to which Section 40-71-10 refers is:

> [A]n ***appointed committee*** which is formed to ***maintain professional standards of a state or local professional society*** as defined in this section or a committee appointed by the Department of Mental Health, or a committee appointed by the Department of Health and Environmental Control to review patient medical and health records in order to study the causes of death . . . ."

S.C. Code Ann. § 40-71-10 (B) (emphasis added).

Section 40-71-10 (A) defines professional society as follows:

> 'Professional society' as used in this chapter 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.

Thus, Section 40-71-20 applies to documents acquired by committees appointed by professional societies, such as the South Carolina Medical Association and the South Carolina Bar Association, to maintain the professional standards of the society. The South Carolina Commission on Lawyer Conduct is an example of an appointed committee of a professional society subject to Section 40-71-20.

The plain language of Section 40-71-20 protects only committees appointed by a state or local professional society to maintain the professional standards of the society. WASH is a South Carolina non-profit corporation that does business as an organ procurement organization and procures and distributes donor organs. (Order at 4). It is not an appointed committee of any kind, and it is certainly not a committee appointed by a professional society to maintain the professional standards of the society. (Order at 4). WASH does not have a majority of eligible licentiates in the area served by it—South Carolina. (Order at 4). In fact, WASH does not have more than a handful of professional licentiates of any type.

The circuit court correctly determined the statute is to be construed in accordance with the legislative intent. (Order at 3, 6-7). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)); *see also Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr*., 407 S.C. 112, 122, 754 S.E.2d 486, 491 (2014).

Section 40-71-20 is clear, and there is nothing in that Section that extends peer review privilege to WASH.

III. The Court Should Not Invoke a "Public Policy Exception" Because the Expressed Intent of the Legislature and the Statutes at Issue are Clear.

Because South Carolina's peer review statutes are plain and unambiguous, this Court need look no further and should decline to invoke a public policy exception that is inconsistent with the Legislature's intent. In an apparent acknowledgment that it is not a hospital or appointed

committee subject to either of South Carolina's peer review statutes, WASH argues that this Court should look beyond the plain language of the statutes and craft a public policy exception for it to encourage peer review. (WASH App. Br. at 16-17). WASH also points out that all fifty States and the District of Columbia recognize some form of medical peer review privilege. (WASH App. Br. at 24). But the issue on appeal is not whether peer review privilege plays an important role in promoting patient health and safety. Nor is the issue about the scope of peer review privileges in other states. Rather, the Court is asked whether the South Carolina Legislature's intent can be ascertained and effectuated by the plain language of the statute.[3] "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)

WASH overlooks the fact that the Legislature reviewed and amended South Carolina's professional society peer review statute in 2012 and expanded the scope of peer review for hospitals to include the hospital's affiliated entities and its committees with the enactment of S.C. Code Ann. § 44-7-392. The South Carolina Legislature could have written the statutes to expand peer review privilege to include other entities in the health care sector, but the South Carolina Legislature chose to leave application of peer review to a narrow class of entities or individuals. The Legislature chose the precise wording in the peer review statutes for good reason. "Privileges are not favored under South Carolina law." *Felder v. Wyman*, 139 F.R.D. 85, 88 (D.S.C. 1991).

[3] Judge McCaslin emphasized that the court could not step into the place of the Legislature regardless of what other peer review statutes other states had implemented. Judge McCaslin informed the parties during the hearing on April 13, 2021: "I understand what you're telling me and I know that [] you've got all of these other states that have their own laws, and basically it's public policy and I understand that, but that doesn't mean that they fit in with South Carolina law, and I'm bound by South Carolina law. This Judge isn't here to make new law, I'll put it to you that way." (April 13, 2021, Hearing Transcript 19:14-20).

The 2012 amendments to South Carolina's peer review statutes further disprove WASH's public policy argument.

WASH is asking this Court to rewrite the statute to recognize peer review for any entity involved in the medical field in any way that appoints its own review committee. Without the limitations imposed by the statute, a myriad of organizations could set up an appointed committee to shield information in their possession from discovery. That rendering would be inconsistent with the Legislature's intent, and it would be bad policy. It would also be counter to authority recognizing that "[t]he scope of discovery in South Carolina is generally broad[,]" and privileges are strictly construed. *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 166-67, 829 S.E.2d 707, 712 (2019) (citations omitted). Furthermore, interpretive additions to the plain language of a statute, like the ones proposed by WASH in this instance, are strongly disfavored in South Carolina. "The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy." *Consumer Advocate for the State of S.C. v. S.C. Dep't of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012) (quoting *Kinard v. Moore*, 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)).

The public policy of South Carolina is that parties are entitled to discovery, and limitations to that entitlement are narrowly construed. The South Carolina Legislature has balanced the competing interests of a party's entitlement to discovery with its desire to protect internal hospital reviews. It did not extend that protection to any entity that cloaks itself with the term "medical procedures," and this Court should honor that decision.

IV. Even if WASH Shared or Obtained Materials From an Entity Subject to Peer Review, Materials and Information in WASH's Possession are Not Protected Under South Carolina's Peer Review Statutes.

Both WASH and UNOS contend that materials which WASH shared with or obtained from Grand Strand and UNOS's MPSC should be afforded protection under South Carolina's peer review statutes because WASH chose to share those documents. (UNOS App. Br. at 10, 12, 15-70-; WASH App. Br. at 17, 27-29). However, the hospital and professional society peer review statutes in South Carolina expressly state 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 committee. S.C. Code Ann.§ 40-71-20 (A) states:

> 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.

Similarly, S.C. Code Ann. § 44-7-392(A)(3) states:

> 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.

The South Carolina Supreme Court has previously explained that it "interpret[s] the 'otherwise available' language [of Section 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 chose to share some of its documents and information with a hospital and/or an appointed committee that, unlike WASH or UNOS, is 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. Furthermore, even if WASH personnel acquired privileged documents or information from a hospital, in this case Grand Strand, such information is still subject to discovery from WASH, even though it might not be subject to discovery directly from Grand Strand. WASH complains that this is illogical, but this is the system the Legislature enacted. "[B]oth statutes [S.C. Code Ann. §§ 40-71-20 (A) and 44-7-392(A)] explicitly state that documents available from original sources are not confidential and are not immune from discovery." *IntegraMed Am., Inc. v. Patton*, 298 F.R.D. 326, 331-32 (D.S.C. 2014).

The logic of the statutes and the South Carolina Supreme Court's rulings are clear and unassailable. A party, such as WASH, that is not protected by the peer review statute cannot obtain that privilege by simply sharing documents with or receiving them from a hospital or committee that is protected.

V. South Carolina's Peer Review Statutes Do Not Apply to the Materials Withheld by WASH.

UNOS and WASH appeal to this Court to apply Virginia's peer review law to the documents and testimony withheld by WASH. (UNOS App. Br. at 8-12; WASH App. Br. at 27-28). WASH seeks to protect documents it created at the request of UNOS, which WASH avers is subject to Virginia's peer review law. (WASH App. Br. at 27). The Virginia peer review statute, however, does not apply to WASH. UNOS's request for a peer review analysis does not confer any particular protection on WASH's materials.

Turning to UNOS, as a preliminary matter, it lacks standing to appeal the circuit court's Order. Rule 201(b) limits the ability to appeal to "[o]nly a party aggrieved by an order, judgment, sentence, or decision[.]" Rule 201, SCACR. This court has previously explained that under Rule 201(b), "[t]he word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." *Beaufort Realty Co. v.*

Beaufort County, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). In this instance, Mrs. Holliman filed the underlying motion to compel against WASH, and the circuit court held that WASH is not entitled to claim peer review privilege. The circuit court ordered WASH, not UNOS, to produce discovery materials and deposition testimony. UNOS is not aggrieved by the circuit court's Order.

Nevertheless, UNOS posits that Virginia's peer review statute, Va. Code Ann. § 8.01-581.17, should protect its documents in WASH's possession from discovery because UNOS conducted the peer review in question at its headquarters in Virginia.[4] (UNOS App. Br. at 8). There is no evidence in the record regarding the location where UNOS's review took place. Moreover, UNOS is asking this Court to adopt its preferred choice of law rule for privileges. Under UNOS's proposed rule, a party could potentially cherry-pick the privilege law that applies by conducting a peer review outside of South Carolina and in the state with an advantageous peer review statute, regardless of where the underlying tort occurred. That would create an absurd result.

UNOS admits that South Carolina adheres to the traditional choice of law rules set forth in the Restatement (First) Conflict of Laws. (UNOS App. Br. at 7). *See also, e.g.*, *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013); *Witt v. Am. Trucking Associations, Inc*., 860 F. Supp. 295, 300 (D.S.C. 1994). Section 597 of the Restatement (First) states that "[t]he law of the forum determines the admissibility of a particular piece of evidence." Restatement (First) Conflict of Laws § 597 (1934). Under traditional choice of law rules, matters affecting the parties' substantive rights are determined by *lex loci*, law of the situs of the claim, and procedural rights are determined by *lex fori*, the law of the forum. *Nash v. Tindall Corp*., 375

[4] UNOS does not fall within any of the three specific types of committees or groups covered by Virginia's peer review statute. *See* Va. Code Ann. § 8.01-581.17(B).

S.C. 36, 39, 650 S.E.2d 81, 83 (Ct. App. 2007) (citing *McDaniel v. McDaniel*, 243 S.C. 286, 289, 133 S.E.2d 809, 811 (1963)). The First Restatement comports with the common law rule that "questions of evidence, including privileges, [are] 'procedural' and governed by the law of the forum." § 5435 State Law Proviso—Choice of Law, 23A Fed. Prac. & Proc. Evid. § 5435 (1st ed). "[T]he substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred."[5] *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001) (citations omitted). Thus, the territorial approach of South Carolina's choice of law rules concentrate on ***the location*** where the particular event at issue took place or the law of the forum. As the circuit court correctly ruled, the issue of whether the documents and communications related to Mr. Holliman's wrongful death are subject to peer review privilege is governed by South Carolina law because Mr. Holliman's ABO incompatible transplant and death occurred in South Carolina, and this case is proceeding in South Carolina. (Order at 6).

UNOS nevertheless disregards South Carolina's traditional choice of law rules and invites the Court to apply the Restatement (Second) Conflict of Laws for a choice of law analysis for privileges. (UNOS App. Br. at 7). *See* Restatement (Second) of Conflict of Laws § 139(1)-(2) (1971). South Carolina has never adopted the choice of law test found in the Second Restatement that UNOS proposes. *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 145, 494 S.E.2d 449, 456 (Ct. App. 1997); *Menezes*, 403 S.C. 522, 530. Even if this Court applied the Second Restatement, which it should not, South Carolina law still applies because it has the most

[5] This interpretation is consistent with federal law that applies the law of the forum state to attorney-client privilege determinations in diversity cases. *See, e.g., Ashcraft v. Conoco, Inc*., 218 F.3d 282, 282 n.5 (4th Cir. 2000) (noting that "the availability of an evidentiary privilege is governed by the law of the forum state"); *see also Hege v. Aegon USA, LLC*, 2011 WL 1791883, at *3 (D.S.C. May 10, 2011); *First S. Bank v. Fifth Third Bank, N.A.*, 2013 WL 1840089, at *3 (D.S.C. May 1, 2013).

significant relationship with the communications and materials at issue.

UNOS cites to the report and recommendation in *Wellin v. Wellin*, No. 2:13-CV-1831-DCN, 2016 WL 7626536 (D.S.C. Mar. 8, 2016) to support application of the Second Restatement (UNOS App. Br. at 7), rather than the district court's order in *Wellin v. Wellin*, 211 F. Supp. 3d 793 (D.S.C. 2016), *order clarified*, No. 2:13-CV-1831-DCN, 2017 WL 3620061 (D.S.C. Aug. 23, 2017. In *Wellin*, the special master determined that New York had the significant relationship to the communications at issue involving a third party. However, the district court rejected the special master's analysis, instead finding that South Carolina, not New York, had the significant relationship with the communications. *Wellin*, 211 F. Supp. at 805. The district court also determined that a location test was "too equivocal to be of any use" for emails and phone calls. *Id*. In lieu of focusing on the location of the alleged privileged communications, the district court examined the state where the relationship between the parties was centered under the guidance of the Second Restatement and concluded that the parties' relationship was centered in South Carolina. *Id*.

Here, UNOS's relationship with WASH, MUSC, Grand Strand, the donor, and Mr. Holliman is clearly centered in South Carolina. WASH and MUSC are both located and incorporated in South Carolina. WASH created the documents and was involved in the communications at issue. UNOS matched Mr. Holliman, a South Carolina citizen, with the ABO incompatible lungs of a South Carolina citizen, who was hospitalized at Grand Strand in Myrtle Beach. Those incompatible lungs were then transplanted into Mr. Holliman and caused his death in South Carolina. Because South Carolina is both the forum state and the state with the most significant relationship to the communications and materials at issue, it is clear that South Carolina law applies. *See Wellin*, 211 F. Supp. at 806 (finding that it was unnecessary to conduct additional

Second Restatement analysis if the significant relationship can be established).

UNOS sets forth the Second Restatements factors for a forum to consider in determining whether to admit evidence. (UNOS App. Br. at 7). *See* Restatement (Second) of Conflict of Laws § 139 (1971). Those factors are not applicable here, even if the Second Restatement did apply, because South Carolina has the significant relationship to the communications and materials at issue. However, those factors still weigh in favor of admitting the evidence. First, the nature of the contacts with South Carolina is well established. Other than UNOS, the relevant parties are located in South Carolina, and all of the relevant events leading to Mr. Holliman's death took place in South Carolina. Second, the evidence sought from WASH is unquestionably material to the claims related to Mr. Holliman's wrongful death. Third, UNOS should not be allowed to rely on a Virginia peer review statute to shield materials in WASH's possession from discovery. Finally, it would be unfair to Mrs. Holliman for the Court to allow UNOS, which is a party to this action, to conceal crucial evidence.[6] Under either the traditional choice of law rules or the Second Restatement analysis, South Carolina law governs whether the documents and information in WASH's possession are privileged.

UNOS is not entitled to claim peer review privilege as to documents in WASH's protection under South Carolina peer review statutes. UNOS is neither a hospital nor an appointed committee which is formed to maintain professional standards of a state or local professional society. UNOS unconvincingly maintains that its Membership and Professional Standards Committee ("MPSC") qualifies as an appropriate committee under Section 40-71-10. (UNOS App. Br. at 12). It does not. MPSC is not an appointed committed formed to maintain the standards of a ***state or local***

[6] According to the Second Restatement, when determining fairness, a forum is more likely to recognize privilege claimed by third parties than if the privilege is claimed by a party to the action. *See* Restatement (Second) of Conflict of Laws § 139 (1971).

professional society. Moreover, UNOS is not a medical organization having as members a majority of the eligible licentiates in the area served by it, which is the entire United States. Lastly, and as explained above, documents in WASH's possession are subject to discovery from WASH regardless of whether they were shared with a hospital or committee that is covered by a peer review statute.

UNOS argues that it is unfair that the hospital peer review privilege is extended to MUSC but not to UNOS or WASH. (UNOS App. Br. at 10). That is a fight UNOS must take up with the Legislature, not this Court. "The narrow construction applied to a recognized privilege suggests no judicial inclination on the part of the South Carolina Supreme Court to expand the number, type, or reach of privileges recognized in this state absent legislative direction." *Felder v. Wyman*, 139 F.R.D. 85, 88 (D.S.C. 1991).

CONCLUSION

S.C. Code Ann. §§ 40-71-20 and 44-7-392 are clear. Neither WASH nor UNOS are covered by those statutes. This Court should affirm the judgment of the circuit court.

Respectfully submitted,

WYCHE, P.A.

s/John C. Moylan, III

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October 1, 2021

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 Case No: 2021-000487

Trial Court Case 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.

PROOF OF SERVICE

This is to certify that I have this date caused to be served a true and correct copy of the foregoing ***Respondent's Initial Brief and Respondent's Designations of Matter to be Included in the Record on Appeal*** on counsel in this action by email, pursuant to the Supreme Court's Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules dated August 25, 2021, by electronic mail, addressed as follows:

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October 1, 2021

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Via E-Filing

October 1, 2021

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

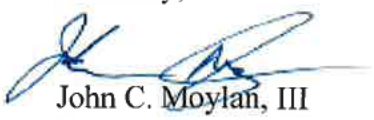
RE: Michelle Cha Holliman, individually and as personal representative of the estate of Allen B. Holliman v. We Are Sharing Hope SC, Medical University of South Carolina, United Network for Organ Sharing, Jacqueline Honig, M.D., and Darla Welker
C/A No. 2020-CP-10-02902, Charleston CP
Appellate Case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

Dear Ms. Kitchings:

Enclosed please find for filing with your office the Initial Brief, Designation of Matter to be Included in the Record on Appeal and Proof of Service on behalf of the Respondent Michelle Cha Holliman, individually and as Personal Representative of the Estate of Allen B. Holliman.

All counsel of record are being served with same via electronic mail.

Sincerely,



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Enclosure

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