

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT 25 2021

SC Court of Appeals

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

Civil Case No. 2020-CP-10-02902
Court of Appeal No. 2021-000487

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

Respondent,

v.

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

Defendants,

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

Appellants,

And of which We Are Sharing Hope SC is

Petitioner.

**PETITION FOR EXTRAORDINARY RELIEF BY A WRIT OF CERTIORARI, AND
MOTION FOR CERTIFICATION OF APPEAL FROM COURT OF APPEALS**

We Are Sharing Hope SC submits this petition pursuant to S.C. Const. art. V, §5 and S.C. Code Ann. §14-3-310, seeking a writ of certiorari to review the Order Regarding Discovery issued by the Honorable Debra R. McCaslin and entered on April 29, 2021, which compels production of and discovery responses as to documents/materials which Sharing Hope claims are protected by a peer review privilege. Sharing Hope already has served and filed a Notice of Appeal in the Court of Appeals, but in an abundance of caution, submits this Petition in response to a jurisdictional issue raised in the Respondent's brief.

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

Sharing Hope also moves this Court pursuant to Rule 204, SCACR, to certify the pending appeal for review by this Court before it has been determined by the Court of Appeals. As discussed below, Sharing Hope will show this Court that the appeal is appropriate because the appeal involves an issue of significant public interest and/or a novel legal principle of major importance.

In support of this Petition, the Appellant Sharing Hope submits an Appendix containing pertinent trial court filings in addition to the initial briefs that already have been filed in the Court of Appeals.

FACTUAL BACKGROUND

A more complete factual background and procedural history can be found in the Appellant's Initial Brief which was previously served and filed in the Court of Appeals, and submitted in the Appendix filed herewith. For the purposes of this Petition, Sharing Hope offers this more concise summary to identify the core legal issues which need immediate appellate review by way of a writ of certiorari for extraordinary review, if not by way of the pending appeal.

This case arises out of the death of Allen B. Holliman ("the Recipient") after he underwent a double-lung transplant on November 27, 2018. The Plaintiff presents claims against the Medical University of South Carolina where the transplant surgery was performed, and claims against the

United Network for Organ Sharing (UNOS) and We Are Sharing Hope SC (Sharing Hope) in connection with the process and procedures by which the organs were donated. All of Plaintiff's claims are focused on the manner and method by which the transplant organs were identified as a blood type match for the Recipient – a process that involves several different organizations who are part of the United States' Organ Procurement and Transplant Network (OPTN). (See App. Ex. B - Complaint.)

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

Federal regulation specifically requires the OPTN to establish appropriate peer review processes for the purpose of evaluating its members' compliance with applicable federal regulations and OPTN policies, including member OPOs. 42 C.F.R. § 121.10. In furtherance of this obligation, UNOS created a Membership and Professional Standards Committee (MPSC) which maintains membership criteria and monitors member compliance based on OPTN membership criteria, bylaws, and policies.¹ In addition, the OPTN Bylaws include provisions for Medical Peer Review and promise confidentiality to promote quality improvement and full disclosure by OPTN members. Bylaws L.3, Medical Peer Review.²

¹ See generally <https://optn.transplant.hrsa.gov/members/committees/membership-and-professional-standards-committee/>.

² https://optn.transplant.hrsa.gov/media/1201/optn_bylaws.pdf.

As the certified OPO for South Carolina, Sharing Hope was bound to participate in medical peer review in connection with the donation case at issue. Accordingly, Sharing Hope and the UNOS MPSC engaged in a retrospective, self-critical quality assurance and peer review evaluation regarding the Recipient's double lung transplant following his death. Sharing Hope also engaged in a root cause analysis³ with the donor hospital, Grand Strand Medical Center, which was conducted to study the Recipient's death in order to identify the root causes towards a goal of improving patient safety protocols.

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

Sharing Hope argues that the materials are protected by a peer review privilege under South Carolina's two peer review statutes, S.C. Code Ann. § 40-71-20 and § 44-7-392, and/or Virginia law, and/or federal law. Sharing Hope also argues, in the alternative, that the statutory peer review privileges should be expanded to cover its peer review materials based on compelling public policy grounds. After a hearing and briefing, the Trial Court (Judge McCaslin) refused to recognize or

³ JCAHO accredited organizations use a comprehensive systematic analysis referred to as root cause analysis to study sentinel events of patient harm in order uncover the factors that lead to patient safety events and improve patient safety by preventing future harm. JACHO Root Cause Analysis in Health Care: Tools and Techniques, <https://www.jcrinc.com/-/media>. See also <https://www.med.unc.edu/ihqi/resources/root-cause-analysis>.

apply any peer review privilege to Sharing Hope, and granted Plaintiff's the motion to compel while denying the motion for a protective order. (See App. Ex. E.)

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

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

(See App. Ex. F.) In due course, the Appellant timely filed an initial brief with designations of matters to be included in the Record on Appeal. (See App. Ex. G.) In its notice of appeal and initial brief, the Appellant specifically referenced the issue of appellate jurisdiction over this discovery order by referencing the appellate jurisdictional provisions of S.C. Code §44-7-394. (See App. Ex. F, Ex. G.) In its brief, the Respondent raises an issue of appellate jurisdiction, arguing that the order is an interlocutory decision that is not appealable at this time, citing a litany of cases which hold that discovery orders are not immediately appealable. The Respondent further contends that the statutory provision for an immediate appeal found in §44-7-394 does not apply because Sharing Hope is not a hospital, a hospital parent, a hospital subsidiary, a health care system, a hospital committee, a hospital's governing body, or a physician practice entitled to a peer review privilege under §44-7-392.

Sharing Hope maintains that appellate jurisdiction is properly founded under §44-7-392, and presents its arguments with citations to applicable caselaw in its reply. (See App. Ex. I.) However, in an abundance of caution, Sharing Hope is submitting this Petition for Extraordinary Relief by a Writ of Certiorari seeking the Supreme Court's review of these novel and important issues of peer review privilege that would become moot if Sharing Hope is forced to produce documents and answer deposition questions about matters involving the peer review process it

participated in as required by its federal certification and contract with UNOS. If Sharing Hope is compelled to produce its peer review documents and allow its employees to testify about the mandatory per review process conducted after the death of Plaintiff's decedent, there is no adequate remedy that could restore the privilege protection after an appellate decision on the existence and application of a peer review privilege.

**PETITION FOR A WRIT OF CERTIORARI --
EXCEPTIONAL CIRCUMSTANCES EXIST IN THIS CASE TO WARRANT THE COURT'S
IMMEDIATE REVIEW OF THE NOVEL AND IMPORTANT ISSUES PRESENTED IN THIS ORDER.**

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

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

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

Sharing Hope acknowledges that as a general rule, pretrial discovery orders are not directly appealable under §14-3-330, but Sharing Hope maintains that the "specialized statute" of §44-7-394 provides the Court of Appeals with appellate jurisdiction of the pending appeal. In the alternative, the Supreme Court still may, in its discretion, allow immediate appellate review of

pretrial discovery orders upon a petition for a writ of certiorari pursuant to the powers granted by the Constitution and §14-3-310. See Trial Handbook for South Carolina Lawyers § 4:37 (5th ed.).

Prior to the passage of §44-7-394 in 2012, the Court had addressed the process for appellate review of discovery orders involving peer review privilege in several cases. The first South Carolina appellate opinion on peer review privilege was McGee v. Bruce Hosp. Sys., 312 S.C. 58, 60, 439 S.E.2d 257, 259 (1993), wherein the Court granted a writ of certiorari to review a trial court order granting a plaintiff's motion to compel and instructing the defendant hospital to produce the credentialing files and clinical privileges for each of the defendant physicians in a medical malpractice action. More specifically, the Court considered the question of whether the credentialing files, clinical privileges, and the policies and procedures involved in the evaluation of medical staff immune from discovery under the terms of S.C. Code §§ 40-71-10 and -20.⁴

In Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 378 S.C. 160, 662 S.E.2d 430 (Ct. App. 2008), *vacated*, 381 S.C. 332, 673 S.E.2d 417 (2009), the defendants filed an appeal from a trial court order denying their motion for a protective order sought under § 40-71-20 and compelling production of the discovery sought by the plaintiff who was suing the hospital and staff members for defamation and conspiracy in connection with reporting the suspension of his hospital privileges to a national database. The Court of Appeals held that the order was appealable and reversed the trial court, in part, finding that questions delving into the committee's proceedings were protected and safeguarded by the statutory provisions. However, the Supreme Court vacated the Court of Appeals decision, declaring that the order on appeal was not immediately appealable.

The distinction between the two different jurisdictional outcomes in McGee and Wieters can be found in the nuances of how the privilege question was presented to the Appellate Courts.

⁴ This same statute is one of the grounds upon which Sharing Hope asserts its privilege.

When these two opinions are read together, it appears that while a discovery order could not be reviewed on a direct appeal under §14-3-330, the Court would grant a petition for a writ of certiorari to provide immediate review of a discovery order that presented a peer review privilege issue.

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

The circumstances presented in this case differ on one crucial point because there is now a statutory authority -- §44-7-394 -- for immediate appeal of a discovery order arising from the peer review privilege protections of §44-7-392. However, in the face of the Plaintiff/Respondent's challenge to the Court of Appeals' appellate jurisdiction and in an abundance of caution, the Appellant/Petitioner is submitting this Petition under the guidance distilled from the Court's decisions in McGee v. Bruce Hospital and Oncology & Hematology Associates v. SC DHEC.

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

- McMakin v. Bruce Hosp. Sys., 318 S.C. 15, 455 S.E.2d 693 (1995), wherein the trial judge ordered disclosure of names, addresses and telephone numbers of former hospital patients.

On petition of the defendant, the Supreme Court allowed immediate review by a writ of certiorari.

- Laffitte v. Bridgestone Corp., 381 S.C. 460, 674 S.E.2d 154 (2009), wherein the Supreme Court granted a petition for a writ of certiorari to review a discovery order compelling defendant corporation to disclose a formula classified as a trade secret.
- Hollman v. Woolfson, 384 S.C. 571, 683 S.E.2d 495 (2009), wherein the Court granted a writ of certiorari to review a trial court order allowing the plaintiffs to contact nonparty defendant's patients.

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

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

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

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

In Oncology & Hematology Associates, 692 S.E.2d at 924, the Court voiced reticence to micromanage discovery orders but chose to grant immediate review of a discovery order by way

of certiorari because of concern that a party's abusive discovery practice was overshadowing litigation of the merits of claims:

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

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

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

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

Similarly, in Binney v. State, 384 S.C. 539, 542, 683 S.E.2d 478, 479 (2009), the Court granted a writ of certiorari to review an PCR order presenting a question of whether the petitioner's attorney-client privilege had been violated when his trial counsel turned over his entire trial file to the Attorney General's Office. The Court stated that it granted the writ of certiorari because the issue was novel and capable of arising in every PCR proceeding.

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

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

This case meets all these factors.

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

The issues presented by Sharing Hope's appeal of Judge McCaslin's order present novel and important issues as stated in the Brief of Appellant:

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?

The arguments on these issues are fully presented in the Brief and Reply Brief of Appellant which are included in the Appendix filed with this Petition, and incorporated as if fully restated.

However, Sharing Hope offers this brief summary to demonstrate the novelty and importance of these issues as a foundation for this Petition and Motion.

The question of whether, and to what extent, a peer review privilege protects post-incident self-critical materials prepared by an OPO pursuant to a requirement of its federal regulatory schema is novel and important question of law. Research of South Carolina law has not revealed any appellate opinion involving assertion of a peer review privilege by an Organ Procurement Organization, and there is no caselaw in South Carolina interpreting or applying § 44-7-392. A wider search of other jurisdictions reveals a dearth of law on the question of whether a federally-certified OPO (or the OPTN/UNOS) can assert a peer review privilege to questions and/or document requests arising from the peer review process mandated by the UNOS-OPO regulatory and contractual requirements. However, the public policy foundation for peer review privilege in the healthcare field is well established.

The Court addressed “the public interest in candid professional peer review proceedings” in McGee v. Bruce Hosp. Sys., 312 S.C. 58, 62, 439 S.E.2d 257, 259 (1993), articulating 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. The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process. (Citations omitted.)

The *McGee* Court spoke on the importance of alleviating the participants’ fear of detrimental consequences of candidly contributing to the peer review process as necessary to accomplish the policy of encouraging full candor in peer review proceedings. *See also* Durham v. Vinson, 360

S.C. 639, 647, 602 S.E.2d 760, 763 (2004) (addressing “the policy goals of promoting candor and open discussion among participants in the peer review process.”)

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

It is the unique nature of the federal Organ Procurement and Transplant Network that underlies the importance of this privilege issue because the peer review process in question is required by federal law and regulation, and Sharing Hope’s continued ability to serve as South Carolina’s OPO requires compliance with UNOS’ peer review process.⁵ The issue is one of significant public interest because of the critically important nature of the work of the OPTN and its OPOs and the essential role that the peer review process plays in optimizing that lifesaving work. The consequences of ordering production in this case also cannot be overstated; an order requiring such production would have a substantial chilling effect on any future peer review process conducted by UNOS because any OPO would be reticent to fully engage in the process for fear of increasing its exposure to liability. In addition, it is necessary to preserve the peer

⁵ 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.

review protection in these circumstances to avoid improperly eroding the peer review protections enjoyed by other entities involved in this case.

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

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

In addition to and apart from the specific motions and Judge McCaslin's order presented for review by the pending appeal and this Petition, Sharing Hope has asserted peer review privilege in response to a series of discovery requests and deposition questions as evidenced by the docket sheet attached in the Appendix. (See docket sheet; App. Ex. A.) Judge McCaslin's order simply is the first to rule upon the issue thereby providing a ruling in need of appellate review.

WASH filed a motion on May 14, 2021 for a protective order to assert a peer review privilege in connection with question posed in the deposition of Tim Whelan, M.D. On May 27, 2021, WASH also filed a motion for a protective order to assert a peer review privilege in connection with questions posed in the deposition of Daniel Stanton. WASH and UNOS together filed a motion on June 11, 2021, to stay discovery during the pendency of the appeal due to the potential for multiple depositions to be reopened and the potential for inconsistent rulings. Plaintiff filed a motion to compel against WASH on May 27, 2021 and a motion to compel documents withheld on an improper claim of peer review privilege against UNOS on June 4, 2021. These

motions came before Judge R Farrell Cothran on July 22, 2021, and he has issued an informal ruling via email correspondence ordering the depositions to be reopened, all of UNOS's privileged materials to be produced (this includes and overlaps with WASH and MUSC's peer review materials) and WASH's documents provided to CMS to be produced which include documents contained on the privilege log. Plaintiff submitted a proposed order as requested, and WASH, MUSC, and UNOS submitted objections to the proposed order. However, Judge Cothran has not issued a formal order as of October 20, 2021.

In addition, WASH filed a motion for protective order for the deposition of David DeStefano on May 7, 2021 which was briefed for Judge Deadra Jefferson for the week of June 14, 2021 and is also appearing on Judge Young's nonjury roster the week of October 25, 2021. WASH filed a motion for a protective order to assert a peer review privilege in connection with questions posed in the deposition of Michael Lotts. (Filed 2/18/21; scheduled for Judge Young's nonjury roster the week of October 25, 2021). WASH filed a motion for a protective order to assert a peer review privilege in connection with question posed in the deposition of Lorraine Kemp. (Filed September 13, 2021; scheduled before Judge Young week of October 25, 2021). WASH filed a motion for a protective order to assert a peer review privilege in connection with question posed in the deposition of Jeff Thomas. (Filed September 17, 2021, scheduled before Judge Young, week of October 25, 2021.) Most recently, Plaintiff Holliman filed a Motion to Compel which virtually relies on Judge McCaslin's order as binding precedent on the peer review issue, notwithstanding that her order is on appeal. (Filed September 20, 2021, scheduled before Judge Young, week of October 25, 2021.) It is anticipated that each and all of these motions will

eventually come before a trial judge for decision and produce a wave of appeals and/or petitions for a writ of certiorari.⁶

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

⁶ These peer review privilege issues not only pervade the discovery practice in this action, but they undoubtedly will become significant in two other related actions arising from other organs donated by the same donor as in this case. One action pending in Charleston County is brought by a recipient that received the donor's heart, but the transplant allegedly was not successful because of incompatible blood types and a second transplant was necessary. Ykeiah Lawrence, et al vs. We Are Sharing Hope SC, et al, 2021-CP-10-02033. (See docket sheet in App. Ex. J.) Another action pending in federal district court is brought by a recipient who received the donor's liver, but the transplant allegedly was not successful because of incompatible blood types and a second transplant was necessary. Joe Patterson v. We Are Sharing Hope SC, et al, 2:21-cv-1242-BHH. (See Docket sheet in App. Ex. K) While the other state court action in Lawrence and the federal court action in Patterson were more recently filed and no discovery motions have yet been filed⁶, and but it is reasonably anticipated that the peer review privilege issue will be an issue in that case. Judicial economy would best be served by providing a definitive ruling by this Court on this novel peer review privilege issue.

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

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

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

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

MOTION FOR CERTIFICATION TO TRANSFER APPEAL – Rule 204(b), SCACR

In conjunction with this Petition for a Writ of Certiorari seeking immediate review, the Petitioner/Appellant also moves the Court to certify the case for review by this Court in the first instance pursuant to Rule 204(b) of the South Carolina Appellate Court Rules which provides:

(b) Certification by Supreme Court. In any case which is pending before the Court of Appeals, the Supreme Court may, in its discretion, on motion of any party to the case, on request by the Court of Appeals, or on its own motion, certify the case for review by the Supreme Court before it has been determined by the Court of Appeals. Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance. The effect of such certification shall be to transfer jurisdiction over the case to the Supreme Court for all purposes.

Rule 204(b), SCACR. Certification for a transfer is appropriate in this case because it involves of significant public interest and/or a legal principle of major importance. Examples of cases wherein the Court has accepted certification of an appeal include: Jowers v. S.C. Dep't of Health & Env't Control, 423 S.C. 343, 353, 815 S.E.2d 446, 451 (2018); Home Med. Sys., Inc. v. S.C. Dep't of Revenue, 382 S.C. 556, 559, 677 S.E.2d 582, 584 (2009); Linog v. Yampolsky, 376 S.C. 182, 186, 656 S.E.2d 355, 358 (2008); Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 133, 638 S.E.2d 650, 655 (2006); Med. Univ. of S.C. v. Arnaud, 360 S.C. 615, 620, 602 S.E.2d 747, 750 (2004).

In MUSC v. Arnaud, the Court took certification of a novel issue on the statutory construction of a state employee's retirement rights. In Linog, the Court chose to answer the question of whether South Carolina should recognize a separate and independent cause of action for medical battery. In Madison, the Court granted certification to answer novel issues of the duties of care owed by a private treatment center or a state agency in supervising a mentally retarded patient.

The peer review privilege questions presented in this case also are novel issues that involve a matter of significant public interest and legal principle of major importance for each and all of the reasons discussed above in support of the Petition for a Writ of Certiorari. In addition, transfer to this Court would place the appellate jurisdiction issues in one forum to avoid a possible conflict

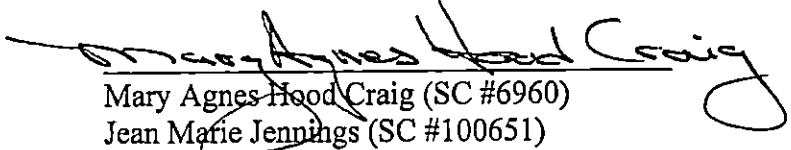
with the Court of Appeals ruling on the jurisdictional issue raised by the Respondent in her brief combined with the merits of the peer review privilege.

CONCLUSION

WHEREFORE, based on the foregoing, the Appellant/Petitioner We Are Sharing Hope SC respectfully petitions the Court to determine the important and novel issues of law presented in this matter. Sharing Hope maintains that appellate jurisdiction for immediate review of this peer review privilege order is well-founded under the authority of §44-7-394, and requests that the Court certify transfer of the pending appeal from the Court of Appeals. In the alternative, Sharing Hope petitions the Court to grant a writ of certiorari for immediate review of the order rejecting Sharing Hope's assertion of a peer review privilege. Sharing Hope respectfully submits that immediate review of this order, whether by a transfer of the pending appeal or by a writ of certiorari, would further the progression of this litigation toward resolution of the merits of the Plaintiff's claims. Ultimately, immediate review by this Court would best serve the public interests in judicial efficiency and in safeguarding and improving the quality of transplant patient care without any prejudice to the Plaintiff.

Respectfully submitted,

HOOD LAW FIRM, LLC



Mary Agnes Hood Craig (SC #6960)
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October 21, 2021

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

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT 25 2021

SC Court of Appeals

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

Civil Case No. 2020-CP-10-02902
Court of Appeal No. 2021-000487

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

Respondent,

v.

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

Defendants,

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

Appellants,

And of which We Are Sharing Hope SC is

Petitioner.

Certificate of Service

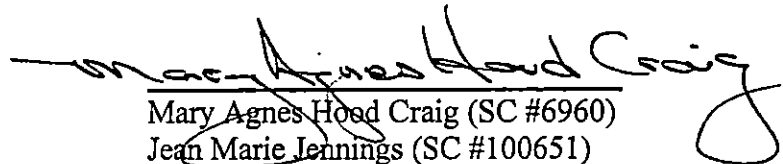
The undersigned certifies that on this 21st day of October 2021, a copy of the **PETITION FOR EXTRAORDINARY RELIEF BY A WRIT OF CERTIORARI, AND MOTION FOR CERTIFICATION OF APPEAL FROM COURT OF APPEALS** was served by emailing a copy of each, on the following counsel at the addresses listed below:

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Attorneys for Appellant We Are Sharing Hope SC

October 21, 2021

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OCT 25 2021

SC Court of Appeals

Via E-Filing and U.S. Mail

The Honorable Patricia A. Howard
Clerk, Supreme Court of South Carolina
P.O. Box 11330
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
Court of Appeals Appellate Case No. 2021-000487
Supreme Court Appellate Case No. _____
HLF File No. 269.009

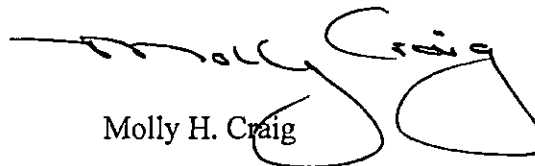
Dear Ms. Howard:

On behalf of We Are Sharing Hope SC, enclosed please find the original Petition for Extraordinary Relief by a Writ of Certiorari, and Motion For Certification of Appeal from Court of Appeals with the Certificate of Service and Appendix, as well as a check for the filing fee in the above-captioned matter. We have filed these electronically and are serving all counsel of record with a copy of same by email. We are also mailing a copy to the Court of Appeals.

Thank you for your time and consideration.

Kind regards,

Yours truly,


Molly H. Craig

MHC/spc

Enclosure(s)

cc: John C. Moylan, III, Esquire [Via E-Mail]
Mary Lucille Dinkins, Esquire [Via E-Mail]
Rachel Lewis Anna, Esquire [Via E-Mail]
James Hunter May, Esquire [Via E-Mail]
Jack G. Gresh, Esquire [Via E-Mail]
Lauren Spears Gresh, Esquire [Via E-Mail]
G. Wade Cooper, Esquire [Via E-Mail]
✓ The Honorable Jenny Abbott Kitchings [Via U.S. Mail]

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
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