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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
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.

FINAL BRIEF OF APPELLANT
United Network for Organ Sharing

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STATEMENT OF ISSUES ON APPEAL

Did the Trial Court err in granting Plaintiff's Motion to Compel against We Are Sharing Hope and denying the Motions for Protective Order filed by We Are Sharing Hope and United Network for Organ Sharing?

Or, as otherwise stated:

I. Does Virginia law apply to the mandatory peer review conducted between an Organ Procurement Organization and the federal Organ Procurement and Transplant Network?

II. Should post-incident self-critical materials prepared or exchanged by a member of the federal Organ Procurement and Transplant Network during its mandatory peer review and quality assurance be protected by a peer review privilege?

STATEMENT OF THE CASE

This appeal arises out of Appellants' We Are Sharing Hope ("Sharing Hope") and United Network for Organ Sharing's ("UNOS") assertion of peer review privilege pertaining to certain materials and communications that were generated during a post-incident peer review required by UNOS, federal law, and federal contract. UNOS, a Virginia charitable organization, manages and serves as the nation's organ transplant system called the Organ Procurement and Transplantation Network (the "OPTN"), under a contract with the U.S. Department of Health and Human Services. [ROA 67; Compl. ¶ 9]. The OPTN provides a computer system to match donated organs with a national list of individuals who need organs. 42 U.S.C. § 274(b)(2). *See generally* 42 U.S.C. §§ 273 *et seq.* ("National Organ Transplant Act" (NOTA)). Sharing Hope is the Organ Procurement Organization ("OPO") designated by HHS to serve South Carolina. Sharing Hope, along with every other OPO, transplant hospital, and transplant histocompatibility laboratory in the United States, are required by CMS regulations to be a member of the OPTN.

In addition to its statutory responsibilities in NOTA, the OPTN is required to maintain a peer review process for reviews of OPOs. 42 C.F.R. § 121.10(b). In managing the OPTN, UNOS has established a Membership and Professional Standards Committee ("MPSC") that, among other things, conducts quality assurance and peer review of OPTN members, and reviews events that are identified as a risk to patient safety, public health, or the integrity of the OPTN. *Id.* Participation in the quality assurance and peer review process is mandatory for continued membership in the OPTN. *See* 42 U.S.C. § 1320b-8(B) (Section 1138 of the Social Security Act) (A transplant hospital must be a member of, and abide by the rules and requirements of the OPTN in order to participate in Medicare).

Here, Sharing Hope fulfilled this requirement following the death of Mr. Holliman. Both UNOS and Sharing Hope have withheld documents that were exchanged, created, and used during the mandatory quality assurance and peer review process. Some of the documentation was also utilized by the co-Defendant hospital, Medical University of South Carolina ("MUSC"), in its quality assurance and peer review evaluation of the case. UNOS joined in Sharing Hope's appeal because of this tripartite relationship to the quality assurance and peer review processes that took place. The parties are so inextricably linked that compelling disclosure of confidential information from one would inevitably result in disclosure of confidential information from the other.

Procedurally, the underlying discovery dispute was initiated by Respondent when it filed a Motion to Compel against Sharing Hope on November 18, 2020. [ROA 163; Plt's Motion to Compel]. UNOS joined Sharing Hope's objection to the discovery and filed a Memorandum in Opposition to Respondent's Motion to Compel Sharing Hope on March 12, 2021. [ROA 386, 399; Sharing Hope Memo in Opp.; UNOS Memo in Opp.]. UNOS also moved for a protective order on April 16, 2021, to prevent production of the UNOS – Sharing Hope peer review documents. [ROA 442; UNOS Motion for Protective Order].

On April 29, 2021, Judge McCaslin compelled Sharing Hope to produce the peer review documents and stated "Defendants' collective Motions for Protective Order are denied." [ROA 10; Judge McCaslin Order]. Sharing Hope served its Notice of Appeal on May 5, 2021, and UNOS joined in the appeal by service of its Notice of Appeal on May 21, 2021. [ROA 542, 547]. Sharing Hope filed its Initial Brief on August 2, 2021, along with the Designation of Matters to be included in the Record on Appeal. Since the procedural history, issues, and facts relevant to this appeal are

largely the same, UNOS adopts by reference Sharing Hope's Initial Brief with additions to the Arguments found below. Rule 208(6), SCACR.

Specifically, UNOS contends that this Court should adopt the most significant relationship test for evaluating evidentiary privileges and that under the same, Virginia law applies and protects the material at issue. Like Sharing Hope, UNOS will also argue that irrespective of whether Virginia law is applied, the material remains protected under the South Carolina peer review statutes, S.C. Code Ann. §§ 40-71-20 and 44-7-392.

STANDARD OF REVIEW

"The determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances." *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 292, 692 S.E.2d 526, 529 (2010). The trial judge's decision will not be overturned absent an abuse of discretion. *Id.* "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." *Fontaine v. Peitz*, 291 S.C. 536, 538–39, 354 S.E.2d 565, 566–67 (1987). 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

I. SOUTH CAROLINA SHOULD ADOPT THE MOST SIGNIFICANT RELATIONSHIP TEST FOR EVALUATION OF EVIDENTIARY PRIVILEGES.

An evidentiary privilege is "[a] privilege that allows a specified person to refuse to provide evidence or to protect the evidence from being used or disclosed in a proceeding." *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.*, 422 S.C. 643, 647–49, 813 S.E.2d 696, 698–700, *certified*

question, sub nom. Hartsock v. Goodyear Dunlop Tires N. Am. Ltd, 723 F. App'x 224 (4th Cir. 2018). The principle underlying recognition of a privilege is simple: although 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." *Id.* (citing *Jaffee v. Redmond*, 518 U.S. 1, 9, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (citations omitted)). "[A]n asserted privilege must also 'serv[e] public ends.' " *Id.* at 11, 116 S.Ct. 1923 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)). In addition, "[i]t is well recognized that a privilege may be created by statute" as deemed appropriate by Congress or a state legislature. *Baldrige v. Shapiro*, 455 U.S. 345, 360, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982); *accord In re Decker*, 322 S.C. 215, 218–19, 471 S.E.2d 462, 463–64 (1995).

A review of privileges in general reveals the common thread that public policy favors the confidentiality of these communications and information. *See, e.g.*, *S.C. State Highway Dep't v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 619–20 (1973) (explaining that privileges, like attorney-client, husband-wife, and priest-penitent relations, are "based upon a wise public policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor, under the pledge of the law that such confidence shall not be abused by permitting disclosure of such communications"). Moreover, "privileged matter in South Carolina is matter that is not intended to be introduced into evidence and/or testified to in Court." *Id.* at 254, 195 S.E.2d at 620.

South Carolina has one evidentiary rule referencing privileges, which states:

> *Except as required* by the Constitution of South Carolina, by the Constitution of the United States or *by South Carolina statute*, the privilege of a witness, person or government shall be governed by the principles of the common law as they may be interpreted by the courts in the light of reason and experience.

Rule 501, SCRE (emphasis added). Thus, unlike many other jurisdictions, South Carolina does not delineate specific privileges through its rules of evidence. Rather, our evidentiary privileges are provided through an assortment of sources: the South Carolina or United States Constitution, the common law, or a statutory provision. When construing a purported statutory privilege, there is no requirement that the word "privilege" be used by the General Assembly in order to evidence an intent to create one. *See, e.g.*, *State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) (citing Section 19-11-30 of the South Carolina Code of Laws as providing a marital privilege although the statute does not use the word "privilege" and simply states "no husband or wife *may be required to disclose* any confidential or, in a criminal proceeding, any communication made by one to the other during their marriage" (emphasis added)).

Currently, South Carolina is one of thirteen states adhering to the choice of law rule traditionally applied in tort cases, *lex loci delecti*, which demands application of the substantive law of the state in which the injury occurred. *See Dawkins v. State*, 306 S.C. 391, 412 S.E.2d 407 (1991). However, South Carolina has not established a choice-of-law doctrine applicable to privilege issues and there does not appear to be any cases which consider the question or any court that has endorsed the *lex loci delicti* principle in the context of applying privilege law to a discovery dispute.

As indicated above, South Carolina still endorses the traditional choice of law principles reflected in the Restatement (First) of Conflict of Laws. However, that Restatement makes no mention of how choice of law decisions regarding privileges should be handled. *See In Re Yasmin*, No. 3:09–md–02100–DRH–PMF, 2011 WL 1375011 at 8 (S.D. Ill.39 April 12, 2011) (summarizing the various approaches adopted by courts throughout the country in analyzing choice of law rules for the assertion of a privilege.).

In predicting how the Supreme Court of South Carolina would rule on the issue, the United States District Court in Charleston found that South Carolina courts would defer to the Restatement (Second) of Conflict of Laws for a choice of law analysis for privilege issues; particularly § 139, which endorses the "significant relationship" test. *See Wellin v. Wellin*, No. 2:13-CV-1831-DCN, 2016 WL 7626536, at *2 (D.S.C. Mar. 8, 2016). The Second Restatement provides that:

> (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.
>
> (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

Restatement (Second) of Conflict of Laws § 139(1)-(2).

This approach makes sense and seems to be the fairest way to evaluate claims of privilege that involve parties from a foreign state. Deference is given to South Carolina law and application of a foreign state's law to an out-of-state party is done only under special circumstances. These "special reason factors" include: "(1) the number and nature of the contacts that the state of the

forum has with the parties and with the transaction involved, (2) the relative materiality of the evidence that is sought to be excluded, (3) the kind of privilege involved and (4) fairness to the parties." *Wellin*, 2016 WL 7626536, at *4.

As the *Wellin* Court acknowledged, this test "provides a reasonable, straightforward resolution to the conflicts of law regarding privileged issues, which by their very nature, frequently concern communication involving multiple states." *Id.* at *5.

II. VIRGINIA'S PEER REVIEW STATUTE APPLIES TO THE UNOS PEER REVIEW UNDER THE MOST SIGNIFICANT RELATIONSHIP TEST.

The Second Restatement provides that the state with the most significant relationship with the communication is usually the state where the communication took place, i.e., "the state where an oral interchange between persons occurred, *where a written statement was received* or where an inspection was made of a person or thing." Restatement (Second), § 139, Cmt. e (emphasis added).

Here, UNOS commissioned and administered the peer review at its headquarters in Virginia, pursuant to the regulatory requirement in the OPTN Final Rule, 42 C.F.R. Part 121, that the OPTN monitor its members for compliance, including through a peer review process, and pursuant to its federal contract which requires the same. The documents were received, processed, and disseminated by UNOS in Virginia to the MPSC. Therefore, the state with the most significant relationship to the communications is Virginia. UNOS and the peer review communications also satisfy the four special reason factors. *See Wellin,* 2016 WL 7626536 at *5 (stating the forum court will apply the privilege of the state with the most significant relationship to disputed communications when there is a special reason justifying the same.).

Weighing the four factors of the Second Restatement's test for a special relationship, it is clear that a special reason exists to justify application of Virginia's peer review privilege. First, the forum state of South Carolina has no significant contacts or relationship with UNOS other than the fact that it is one of the 50 states which participates in the national OPTN that is operated by UNOS under contract with the federal government. The OPTN is not an arm or agency of the federal government, but rather it is a private, not-for-profit entity run by UNOS from its headquarters in Richmond, VA.

Second, the evidence is not material to Respondent's case. Evidence of medical malpractice is proved through expert opinions formulated from the facts and circumstances known by the providers at the time of the incident, not through retrospective, post-incident peer review activities. *Cf. Taylor v. Medenica*, 324 S.C. 200, 213, 479 S.E.2d 35, 42 (1996) (holding witness testimony was not peer-review protected because the testimony "was based on information he obtained *independently* of the peer review committee process" (emphasis added)). Third, the peer review privilege is a widely accepted and recognized privilege, all with the goal of promoting open and honest communications to improve patient care and prevent future adverse outcomes—South Carolina has two different statutes providing for protection of such material. *See* S.C. Code Ann. §§ 44-7-392; 41-71-20. Finally, and most importantly, it would be fundamentally unfair and ultimately impossible to force a national organization, with a federally required peer review process, to develop a peer review process that is in compliance with every state's peer review privilege laws.

Practically speaking, how could a national organization that works with numerous providers in every state develop a peer review process that would receive protection from each of the 50 states' vastly differing peer review statutes? Such an expectation would impose an undue burden on UNOS and, in states where it would not otherwise receive protections, defeat the purpose and overall policy of the privilege—to encourage full participation in the process and promote complete candor and openness for the purpose of identifying areas for quality improvement, to the ultimate benefit of the transplant patients served by the OPTN. UNOS created, designed, and carries out its peer review process in accordance with Virginia law with member OPOs and transplant hospitals who participate under the belief and reasonable expectation that it will be kept confidential and not subject to disclosure in litigation. UNOS extends these confidentiality assurances to the OPTN members and has explicitly enumerated this promise in its Bylaws, which leads OPTN members to participate in the peer review process with the expectation that it will be protected.

Additionally, application of the South Carolina law to a peer review process compelled by federal law, and executed outside of South Carolina creates an absurd and fundamentally unfair result. In the instant case, defendants Sharing Hope and Medical University of South Carolina (MUSC) are members of the OPTN and participated in the OPTN peer review process. However, under application of the South Carolina law, the trial court finds that the peer review privilege applies to the UNOS peer review of MUSC, yet the privilege does ***not*** apply to the UNOS peer review of Sharing Hope. This disparate outcome is difficult to square with any notion of "fairness to the parties." *See Wellin*, 2016 WL 7626536, at *4.

III. VIRGINIA'S PEER REVIEW STATUTE PROTECTS THE PEER REVIEW MATERIAL WITHHELD BY UNOS AND SHARING HOPE.

The Virginia Peer Review Statute provides, in pertinent part:

> The proceedings, minutes, records, and reports of any (i) medical staff committee, utilization review committee, professional program, or other committee, board, group, commission, or other entity as specified in § 8.01-581.16 . . . *together with all communications*, both oral and written, such *originating in or provided to committees* or entities, *are privileged communications which may not be disclosed or obtained by legal discovery proceedings* . . . .

Va. Code § 8.01-581.17 (emphases added). In reviewing the plain language of Virginia's Peer Review statute, all "peer review records 'are privileged communications which may not be disclosed or obtain by legal discovery proceedings.'" *HCA Health Servs. of Va., Inc. v. Levin*, 260 Va. 215, 220, 530 S.E.2d 417, 419–20 (2000). The language of the Peer Review Statute does not limit its application to any particular type of lawsuit or action. *Id.*, 260 Va. at 220, 530 S.E.2d at 420. The privilege "does not belong to the physician who is subject to the peer review and may not be unilaterally waived by the physician" because such waiver would run "counter to the purpose of the statute that encourages physicians to participate candidly in the peer review of *other* physicians, with the expectation that the information submitted will remain confidential and shielded from public disclosure." *Id.*

These protections apply to every committee, group or entity that "functions primarily to review, evaluate, or make recommendations on . . . (ii) the professional services furnished with respect to the medical . . . necessity for such services; . . . (iv) the adequacy or quality of professional services; (v) the competency and qualifications for professional staff privileges." Va. Code § 8.01-581.16.

Here, the documents and information being withheld by Sharing Hope were collected and created for the purpose of peer review and quality assurance at the direction of UNOS' MPSC. As noted herein and by Sharing Hope in its brief, the MPSC is a "committee" that conducts quality assurance and peer review of OPTN members, and reviews events that are identified as a risk to patient safety, public health, or the integrity of the OPTN. The sole purpose behind the OPTN Board of Directors' creation of the MPSC was to review, evaluate, and make recommendations on the medical services provided by the member hospitals and OPOs, the adequacy and quality of the transplant services, and qualification/compliance for OPTN membership placing UNOS well within the ambit of Va. Code. § 8.01-581.16. Accordingly, the Virginia peer review statute dictates that the privilege is held by UNOS and cannot be unilaterally waived.

IV. EVEN IF THIS COURT UPHOLDS THE TRIAL COURT'S APPLICATION OF SOUTH CAROLINA LAW, THE UNOS-SHARING HOPE PEER REVIEW MATERIAL IS STILL AFFORDED PROTECTION UNDER SOUTH CAROLINA'S PEER REVIEW STATUTES.

South Carolina Peer Review Privilege is found in S.C. Code Ann. § 40-71-20 and S.C. Code Ann. § 44-7-392. Section 40-71-20 protects peer review activities conducted by an appointed committee formed to maintain professional standards of a state or local professional society. As Sharing Hope pointed out in its brief, which UNOS adopts by reference, the MPSC qualifies as an appropriate committee under S.C. Code Ann § 40-71-10, making the peer review material confidential under S.C. Code Ann. §40-71-20. Furthermore, UNOS is in possession of numerous materials from MUSC's quality review which has already been deemed privileged by the circuit court under S.C. Code Ann. § 44-7-392.

It is anticipated that Respondent will argue the information and documents are not privileged because it is an "original source". This argument fails because Sharing Hope is not an

original source. The documents being withheld by Sharing Hope were created at the direction of UNOS' MPSC as part of the peer review process. Accordingly, these documents should not be compelled for production by this Defendant. In contrast, medical records, policies, procedures and the like from either MUSC or Sharing Hope that preexisted the peer review investigation would be original sources. *See McGee v. Bruce Hosp. Sys.*, 312 S.C. 58, 62, 439 S.E.2d 257, 260 (1993) ("[I]nformation that is available from a source other than the committee does not become privileged simply by being acquired by the review committee."); *Prince v. Beaufort Memorial Hosp.*, 392 S.C. 599, 609, 709 S.E.2d 122, 128 (2011) ("To the extent the QAC obtained documents from other sources during the course of its investigation, Prince may seek copies of those documents from the original sources but not from the QAC file."). Those materials, if in the possession of UNOS, have been turned over. Instead, anything that Sharing Hope prepared explicitly for the UNOS peer review investigation is not an original source, as it did not exist outside of the peer review process.

Other jurisdictions follow the "original source" exception as well. *See Powell v. Community Health Systems, Inc.*, 312 S.W.3d 496 (Tenn. Supreme Ct. 2010) (holding that an employee was *not* an original source because "the focused investigation that [the employee] performed and the report of that investigation she prepared were undertaken at the request of the Quality Review Committee in the exercise of its peer review functions"); *State ex rel. Wheeling Hosp., Inc. v. Wilson*, 236 W. Va. 560, 573, 782 S.E.2d 622, 635 (2016) ("We further hold that, where documents sought to be discovered are used in the peer review process but either the document, itself, or the information contained therein, is available from an original source extraneous to the peer review process, such material is discoverable from the original source, itself,

but not from the review organization that has used it in its deliberations."); *Ex parte Qureshi*, 768 So.2d 374, 378 (Ala. Supreme Ct. 2000) ("[A] plaintiff seeking discovery cannot obtain directly from a hospital review committee documents that are available from the original source, but may seek such documents from the original source."); *Shelton v. Morehead Memorial Hosp.*, 318 N.C. 65, 83, 347 S.E.2d 824, 829 (1986) ("[I]nformation, in whatever form available, from original sources other than the medical review committee is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings.").

In considering the question of whether South Carolina's confidentiality statute precluded discovery sought by a patient in a medical malpractice action, the Supreme Court of South Carolina adopted the reasoning of the Supreme Court of Florida. *See McGee*, 312 S.C. at 58, 439 S.E.2d at 257 (citing *Cruger v. Love*, 599 So. 2d 111, 112 (Fla. 1992)). In *Cruger*, the Supreme Court of Florida found that the peer review privilege "protects any document considered by the committee or board as part of its decision-making process. The policy of encouraging full candor in peer review proceedings is advanced only if all documents considered by the committee or board during the peer review or credentialing process are protected." *Cruger*, 599 So. 2d at 112. The *Cruger* Court rejected the idea that documents provided from a physician to the reviewing committee were from an "original source" because the documents in question were created by the physician as part of the application process to be submitted to the committee.

In *McGee*, the Supreme Court of South Carolina adopted the following reasoning from the *Cruger* Court:

> The 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, 312 S.C. at 61–62, 439 S.E.2d at 259–60.

The Supreme Court of South Carolina recognized the public interest in candid professional peer review proceedings outweighs a civil litigant's need for information from the most convenient source. The court interpreted the "legislative intent to protect not only documents generated by the committee, but also documents acquired by the committee in the course of its proceedings." *Id*.

The same protections should be extended to the materials withheld by Sharing Hope and UNOS as they are part of a confidential medical peer review process, as delineated on many of the documents contained therein. Review and oversight by UNOS of one of its members, Sharing Hope, by way of a federally required peer review process is the very scenario that the legislature sought to protect through enactment of the statute. To compel production of these documents and materials would dismantle the long-standing public policy of protecting this exact type of information, which is to encourage *health care professionals* to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care. *Durham v. Vinson*, 360 S.C. 639, 646, 602 S.E.2d 760, 763 (2004) (citing *McGee*, 312 S.C. at 61, 439 S.E.2d at 259).

The Court should further consider the attenuated connection between UNOS and Plaintiff's claims. UNOS has no significant contacts with the forum state. UNOS, from its headquarters in Virginia, operates the computer that produces a list of potential organ matches based on a programmed algorithm that uses data elements supplied by other hospitals and OPOs. Were UNOS not a defendant and Plaintiff issued a subpoena in Virginia for these same materials, Virginia law as to peer review protections would unquestionably apply. *See Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 289 Va. 426, 770 S.E.2d 440 (2015) ("[E]nforcement of a subpoena seeking out-of-state discovery is generally governed by the courts and the law of the state in which the witness resides or where the documents are located." (internal citation omitted)). Even if Virginia law does not apply, South Carolina law and public policy supports UNOS's and WASH's assertion of privilege as to these materials produced exclusively for the purposes of engaging in a federally mandated peer review process designed to achieve quality improvement and ensure the implementation of measures to improve the care of transplant patients nationwide.

CONCLUSION

South Carolina should adopt the most significant relationship test for evaluation of evidentiary privileges consistent with the Restatement (Second) of Conflict of Laws "most significant relationship test". Under that test, Virginia's peer review statute applies to the UNOS peer review involving Sharing Hope. Virginia's peer review statute clearly protects the peer review material withheld by UNOS and Sharing Hope, and preserves the efficacy and laudable goals of this federally required peer review process. Should this Court uphold the trial court's application of South Carolina law, the UNOS-Sharing Hope peer review material is still afforded protection under South Carolina's peer review statutes; to find otherwise would lead to inconsistent and

unintended consequences to similarly situated parties based solely on whether an out-of-state defendant is joined, even under the most tenuous of claims.

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

Respectfully submitted,

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