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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 REPLY BRIEF OF APPELLANT
United Network for Organ Sharing

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ARGUMENT

I. UNOS HAS STANDING TO APPEAL THE CIRCUIT COURT’S ORDER

Contrary to Respondent’s argument, UNOS has standing to appeal the Circuit Court’s Order because it is a party aggrieved by Judge McCaslin’s Order. Rule 201 of the South Carolina Appellate Court Rules (“SCACR”) provides that “[o]nly a party aggrieved by an order, judgment, or sentence may appeal.” A party is deemed aggrieved by “a judgment when it operates on his or her rights of property or bears directly on his or her interest.” *Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (2001). The term “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.” *Id.*; see *Parker v. Brown*, 195 S.C. 35, 44-45, 10 S.E.2d 625, 629 (1940) (“An aggrieved party or person is one who is injured in a legal sense; one who has suffered an injury to person or property.”)

As UNOS discussed in its principal brief, UNOS moved for a protective order on April 16, 2021, to prevent the production of the UNOS-Share Hope peer review documents. [ROA 442; UNOS Motion for Protective Order]. In the Order, Judge McCaslin compelled the disclosure of the peer review documents and specifically stated “*Defendants’ collective Motions for Protective Order are denied.*” [ROA 10; Judge McCaslin Order]. UNOS and Sharing Hope have withheld documents that were exchanged, created, and used during the mandatory quality assurance and peer review process. Therefore, UNOS joined in Sharing Hope’s objection to Respondent’s Motion to Compel Sharing Hope to produce the same peer-reviewed documents UNOS withheld in discovery. Denouncing UNOS as a non-aggrieved party would ignore the fact that forcing

Sharing Hope to disclose the peer-reviewed documents logically places UNOS in the forced disclosure as well.

II. THE SOUTH CAROLINA COURT OF APPEALS SHOULD REVIEW THE CIRCUIT COURT'S ORDER

Respondent overlooks the South Carolina Supreme Court's rationale in *Tucker v. Honda of South Carolina Manufacturing, Inc.*, 354 S.C. 574, 582 S.E.2d 405 (2003). In *Tucker*, the Court of Appeals dismissed the appellants' appeal as interlocutory because it involved the applicability of the attorney-client privilege. *Id.* at 576, 582 S.E.2d at 406. The Supreme Court agreed that the appeal was interlocutory, but nonetheless reviewed the merits of the appeal "for the benefit of the Bench and the Bar" in order to "clarify the procedure for review of claims of attorney client privilege." *Id.* at 578, 582 S.E.2d at 407.

Here, South Carolina has made abundantly clear the importance of protecting the sanctity of the peer-review mechanism:

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.

See McGee v. Bruce Hosp. Sys., 312 S.C. 58, 61-62, 439 S.E.2d 257, 259-60 (1993). South Carolina has found "that the public interest in candid professional peer review proceedings should prevail over the litigant's need for information from the most convenient source." *Id.* at 62, 439 S.E.2d at 260. Simply put, "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.” *Id.* (quoting *Cruger v. Love*, 599 So.2d 111 (Fla.1992)).

If the peer-reviewed documents are ultimately disclosed, the rationale discussed in *McGee* will be destroyed and the benefits of UNOS’ federally-imposed peer review process will dull amid fear of reprisal. Consistent with *Tucker*, the Court of Appeals should review this critical area of law and rule that the peer-reviewed documents are undiscoverable.

III. VIRGINIA’S PEER REVIEW STATUTE APPLIES IN THIS CASE

A. UNOS Falls Within the Virginia Peer Review Statute

Respondent makes the transitory assertion in a footnote that UNOS does not fall within any of the groups listed in the Virginia peer review statute. Va. Code Ann. § 8.01-581.17(B). As already described by UNOS and Sharing Hope, UNOS is a Virginia-headquartered charitable organization that manages and serves the federally designated national Organ Procurement and Transplantation Network (“OPTN”). (ROA 67; Compl. ¶ 9). The OPTN must maintain a peer review process for reviews of entities like Sharing Hope, who are Organ Procurement Organizations (“OPO”). 42 C.F.R. § 121.10(b). The OPTN Membership and Professional Standards Committee (“MPSC”) conducts peer reviews of the OPTN members and reviews incidents and situations that concern patient safety, public health, and the OPTN’s integrity. *Id.*

The Virginia peer review statute broadly applies to:

[A]ny (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; (ii) nonprofit entity that provides a centralized credentialing service; or (iii) quality assurance, quality of care, or peer review committee established pursuant to guidelines approved or adopted by (a) a national or state physician peer review entity, (b) a national or state physician accreditation entity, (c) a national professional association of health care providers or Virginia chapter

of a national professional association of health care providers, (d) a licensee of a managed care health insurance plan (MCHIP) as defined in § 38.2-5800, (e) the Office of Emergency Medical Services or any regional emergency medical services council, or (f) a statewide or local association representing health care providers licensed in the Commonwealth[.]

Va. Code Ann. § 8.01-581.17(B). At minimum, UNOS is a nonprofit entity that provides a centralized credentialing service, let alone has established the MPSC to conduct quality assurance and peer review of OPTN members. Respondent's position that UNOS is not protected by the Virginia peer review statute, of which it affords no explanation, is therefore incorrect.

B. The Restatement (Second) Conflict of Laws Shows that Virginia Law Applies

Respondent asserts that UNOS' reliance on the recommendation in *Wellin v. Wellin*, No. 2:13-CV-1831-DCN, 2016 WL 7626536, at *2 (D.S.C. Mar. 8, 2016) (*Wellin I*), is misplaced because we fail to cite the District Court's order in *Wellin v. Wellin*, 211 F. Supp. 3d 793 (D.S.C. 2016) (*Wellin II*). However, the District Court in *Wellin II* agreed with the recommendation in *Wellin I* that the Second Restatement should and would apply to which state had the most significant relationship to answer the applicable privilege question. *Wellin II*, 211 F. Supp. 3d at 804. The District Court discussed that South Carolina had "not taken a position on this specific issue" and instead predicted that South Carolina would conclude "that the Second Restatement test should apply." *Id.* Moreover, the District Court noted that the "Second Restatement test is considered representative of the prevailing approach among states that have established a choice of law doctrine regarding privileges" and that "South Carolina courts have also shown a willingness to apply the Second Restatement in the past." *Id.* (citations omitted).

While this suit may have been filed in South Carolina, UNOS is a national organization that operates wholly in Virginia and conducts its federally-mandated peer review in Virginia, also

required by federal law. 42 C.F.R. Part 121. Respondent materially misstates the relationships between the various parties in a pale attempt to link UNOS to the forum state, and such statements without support in the record should not be considered. Specifically, Respondent incorrectly asserts that UNOS has a relationship with Grand Strand, the organ donor, and the organ recipient; there is no relationship or contacts of any type between any of those individuals and UNOS. UNOS operates a computer system that contains information on organ donors and recipients, which is entered remotely into its computer system by organ procurement organizations, such as Sharing Hope, and transplant centers, such as MUSC. UNOS does not independently collect any information.

Respondent buries in a footnote the reason UNOS was joined as a nominal party: “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* Respondent’s Initial Brief, p. 22 n.6 (citations omitted). Were UNOS not a party to this action, a third-party subpoena issued to UNOS in Virginia, and UNOS would doubtless receive the protection of the Virginia peer review statute. Va. Code Ann. § 8.01-581.17. Respondent alleges in the Complaint, in essence, that Sharing Hope entered an incorrect blood type for a donor with whom UNOS had no connection of any kind, and that the UNOS computer systems operating the national organ transplantation network from its headquarters in Virginia electronically matched that donor with the decedent. At a minimum, a more substantial connection with the locus must be alleged by the Respondent before invalidating the peer review privilege available for a federally required process. 42 C.F.R. § 121.10(b)(1).

In this case, all of the communications, information, and documents sought by Respondent occurred in Virginia. Holding otherwise would allow an enterprising plaintiff to forum shop

jurisdictions to bypass these protections.

Contrary to Respondent's argument, these peer-reviewed documents are only material insofar as they superficially pertain to the incident in question. As UNOS discussed in its principal brief, medical malpractice claims are determined by analyses during the time of the incident, not post-hoc rationalizations of how to adjust and improve the quality of the services rendered *going forward*. Although Respondent argues that UNOS is using Virginia's peer review statute as a "shield," that is in fact what a privilege to discovery of certain materials entails. Because South Carolina has a strict peer review privilege, and all other states have similar, if not more sweeping, privileges, this issue is an important one and should not be overlooked.

Respondent attempts to cast this case as a straightforward state law medical malpractice case. But the parties involved murky the water. This case deals with organizations controlled by a deep federal procedure, involving strict federal obligations and spans across many states, as outlined by both UNOS and Sharing Hope in their principal briefs. Fairness dictates that Virginia law should apply to the peer review process obligated by UNOS in ensuring the proper administration of the national organ transplant system.

IV. SOUTH CAROLINA'S PEER REVIEW STATUTE APPLIES TO UNOS BECAUSE EVERY TRANSPLANT HOSPITAL AND ORGAN PROCUREMENT ORGANIZATION IN THE UNITED STATES IS A MEMBER OF THE OPTN

Without any support in the record, Respondents state incorrectly that "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." (Respondent's Initial Brief, p. 23). On the contrary, **"every transplant hospital program, organ procurement organization and transplant**

histocompatibility laboratory in the United States is an OPTN member.”¹ (emphasis in original); *see also* 42 C.F.R § 482.72 (stating that transplant programs must be a member of the OPTN as a condition of participation in the Medicare program).

CONCLUSION

Respondent’s remaining arguments unaddressed by UNOS herein are appropriately discussed and rebutted in UNOS’ principal brief. For the additional reasons stated herein, the Circuit Court’s Order should be reversed.

Respectfully submitted,

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¹ *See* U.S. Dep’t of Health and Human Services, <https://optn.transplant.hrsa.gov/members/> (last visited 10/20/2021).