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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.

***AMICUS CURIAE OF THE AMERICAN MEDICAL ASSOCIATION AND SOUTH
CAROLINA MEDICAL ASSOCIATION IN SUPPORT OF THE APPELLANTS***

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STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to Rule 213, SCACR, Amicus Curiae, the American Medical Association and the South Carolina Medical Association, file this Brief in Support of Appellants We Are Sharing Hope (“Sharing Hope”) and United Network for Organ Sharing (“UNOS”) (collectively “the Appellants”). Amicus Curiae, the American Medical Association (the “AMA”), is the largest professional association of physicians in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA’s policy-making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including South Carolina.

Amicus Curiae, the South Carolina Medical Association (the “SCMA”) is a South Carolina non-profit membership organization that represents physicians of all specialties and geographic locations within South Carolina. SCMA is the State’s largest physician organization, representing more than 6,000 physicians, residents, and medical students. SCMA regularly advocates on behalf of physicians by raising important health care issues, including issues that have the potential to adversely affect the rights of physicians, the practice of medicine, and the quality of medical care.

Both the AMA and the SCMA appear on their own behalf and as representatives of the Litigation Center of the AMA and the State Medical Societies. The mission of the Litigation Center is to represent the interests of the medical profession in courts through the country. The Litigation Center brings lawsuits, files amicus briefs, and otherwise provides support or becomes actively involved in litigation of general importance to physicians. The Litigation Center's docket

encompasses a wide variety of cases over the entire medical-legal landscape, including physician payment issues, medical staff privileges, medical liability issues, peer review, and scope-of-practice matters, among many other topics.

Each Amicus Curiae has a unique and substantial interest in the issues presented by the instant case. They, and their members, believe strongly in the need for a robust peer review process to uncover concerns that should be addressed to protect the public and the need for direct testimony without fear of reprisal for speaking the truth. The efficacy of such peer review proceedings and the need for candor in the peer review process regarding events, colleagues, and peers, necessitates that the materials and records used in and resulting from the peer review process remain privileged and protected.

The AMA and the SCMA are appropriate amici under Rule 213 of the South Carolina Appellate Court Rules. Amici urge this Court to consider the legal and policy considerations advanced in this Brief Amicus Curiae, which compels the conclusion that the trial court’s decision must be reversed.

STATEMENT OF THE FACTS

This case involves an appeal by Sharing Hope and UNOS from a Charleston County Court of Common Pleas’ granting of Respondent’s Motion to Compel and denial of Appellants’ motions for protective order, which sought protection of peer review documents. The underlying lawsuit arose after the death of Allen B. Holliman, who passed away on November 27, 2018 after undergoing a double lung transplant. The Personal Representative of Mr. Holliman’s Estate alleges that during the transplant, Mr. Holliman received lungs with the wrong blood type, causing his death. Mr. Holliman’s estate brings claims against Sharing Hope and UNOS regarding

Appellants' processes and procedures surrounding organ donation. Following Mr. Holliman's death and before suit was filed, a post-incident peer review process was initiated by Sharing Hope, as required by federal law. The Appellants assert that peer review privilege exists for certain materials that were created during this review process, and they seek a reversal of the Common Pleas' Order requiring production of these materials.

Sharing Hope is a South Carolina organ procurement organization ("OPO"). The Organ Procurement and Transplantation Network ("OPTN"), which is managed by UNOS, is the national organ transplant system that matches those in need of organs with organs that have been donated for that purpose, as contemplated by the National Organ Transplant Act, 42 U.S.C. §§ 273 *et. seq.* and 42 U.S.C. §274(b)(2). OPOs like Sharing Hope are required to join OPTN, and OPTN has its own peer review process and review of OPOs, which is mandatory for all OPOs. The National Organ Transplant Act also requires a peer review process. Acting pursuant to its obligations as an OPTN member, Sharing Hope completed its quality assurance and peer review process following the death of Mr. Holliman.

The documents that the Appellants have withheld from production, and that they claim are peer review privileged, are those related to the review process completed after Mr. Holliman's death. During discovery, the Respondent sought production of the peer review materials in Sharing Hope's possession through written discovery requests and deposition questioning. Sharing Hope objected on the basis that the materials were privileged and protected by South Carolina's peer review statutes, namely §§ 44-7-392 and 40-71-10 *et. seq.*, and Virginia state and federal laws. On November 18, 2020, the Respondent filed a motion to compel Sharing Hope to produce the materials. Sharing Hope and UNOS filed motions and memorandums in opposition to the motion

to compel and protective orders. On April 29, 2021, Judge McCaslin of the Charleston County Court of Common Pleas issued an Order requiring that the peer review materials be produced to the Respondent. On May 5, 2021, Sharing Hope filed its Notice of Appeal before this Court, and UNOS' appeal followed.

SUMMARY OF ARGUMENT

The trial court erred in finding that Sharing Hope's peer review materials were not protected by privilege and in ordering their production to the Respondent. The trial court's decision violates the plain language of S.C. Code Ann. Sections 44-7-390, 44-7-392, and 44-7-394 (the "Peer Review Law") which protects peer review materials like those created by the OPO and the federal OPTN in this case. Additionally, the trial court's decision cannot be reconciled with the public's need for frank and honest communication in peer review proceedings to improve the quality of care. As other states have recognized, peer review records and materials must be protected to promote the public's interest in improving health care quality. The AMA and SCMA urge the Court to reverse the decision of the trial court. Peer review records must be privileged to achieve the purposes of the peer review process – the continuous improvement of providers and the quality of care they provide the public.

ARGUMENT

A. Peer Review Protections Are Necessary to Promote Public Policy and Interests in Improving Health Care.

The South Carolina Rules of Evidence require "reason and experience" to guide this Court's decision as to whether or not to apply the peer review privilege in this case: "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.**” SCRE 501, emphasis added. Amici possess considerable experience, understanding, and a unique perspective on the issue of peer review. As health care providers, they understand the need for open and honest dialogue in the peer review setting as well as the overarching need for confidentiality regarding these discussions.

Indeed, the importance of confidentiality in the peer review setting cannot be overstated. While some physicians may feel compelled to report critically on peers even in the absence of protection, a great many are likely to be deterred unless they are assured that their report will not be made public, for fear of censure and retaliation, or because they are conflict-averse and do not wish to face, or be held accountable by, the peer who is the subject of their report. Given the myriad of such human factors involved in peer review, state statutes generally give broad protections to peer review materials.

As this Court is aware, “peer review” is a fluid process that presents in many forms. Generally, it is the process or procedure that physicians and hospitals use to critically analyze and review the performance and capability of individual physicians and other health care professionals. Peer review generally occurs both on a periodic basis or when health care professionals seek to join a medical staff of a hospital or other health care organization. Peer review can occur in a formalized committee-based procedure in a major hospital, or in a process of critical evaluation of one physician by a supervisor or directly by a colleague. The purpose of peer review is to ensure the highest quality of health care within an organization by allowing colleagues to critically analyze, in the most robust fashion, medical services performed by other physicians. *See* Kenneth

Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 Mass. L. Rev. 157 (2002).

Confidentiality is especially critical in the context of investigations, root cause analysis meetings, and morbidity and mortality conferences, which are oftentimes conducted not just to assess a particular physician's competence, but also to prevent future harm. Public policy supports a reading of statutes that fosters rather than inhibits peer review activities. Upholding the trial court's refusal to apply peer review protections to quintessentially peer review functions would acutely curtail the effectiveness of such efforts. Patient safety would be compromised, which clearly is not what the General Assembly intended. There are many reasons that healthcare providers may be reluctant to participate in the peer review process unless they are assured that their contributions will be kept confidential. *See* George E. Newton II, *Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection*, 52 Ala. L. Rev. 723, 723.

B. The plain language of the Peer Review Law protects peer review materials of both an OPO and UNOS

South Carolina's peer review statute was originally promulgated at S.C. Code Ann. Sections 40-71-10, 40-71-20, and 40-71-30. The Peer Review Law was then substantially amended and further codified effective June 26, 2012, at S.C. Code Ann. Sections 44-7-390, 44-7-392, and 44-7-394 to further the interest of patient safety by encouraging candid discussions and reviews of patient care. As our Attorney General has opined, any analysis must "start with the proposition that the peer review statute is remedial in nature and, thus, must be broadly construed." Interpretation of Section 40-71-10 and 40-71-20, 1999 S.C. AG LEXIS 56, at *1

(Op. S.C. Att’y Gen. June 21, 1999).

Respondent’s arguments that the Peer Review Law does not extend to Sharing Hope-UNOS’s peer review materials at issue in this case requires that the Peer Review Law be read without importing any meaning to the phrases “any other organization,” “external reviews,” and “including, but not limited to”. Section 44-7-390 provides that:

There is no monetary liability on the part of, and no cause of action for damages arising against...**external reviewers**, witnesses... relating to:

(1) sentinel event investigations or root cause analyses, or both, as prescribed by the joint commission **or any other organization** under whose accreditation a hospital is deemed to meet the Centers for Medicare and Medicaid Services' conditions of participation;

(6) reviews or investigations to evaluate the quality of care provided by hospital employees, agents, members of the hospital's medical staff, or other practitioners; or

(7) **reports or statements, including, but not limited to**, those reports or statements to the National Practitioner Data Bank and the South Carolina Board of Medical Examiners, **that provide analysis or opinion (including external reviews) relating to the quality of care provided by hospital employees, agents, members of the hospital's medical staff, or other practitioners.**

S.C. Code Ann. §44-7-390, emphasis added. Sharing Hope and UNOS are organizations who prescribe sentinel event investigations or root cause analyses at hospitals ensuring they meet both the transplant Conditions of Participation (at §§ 482.72 through 482.104) and the hospital Conditions of Participation (specified in 42 CFR 482.1 through 482.57). As external reviewers undertaking peer review activities they are both protected from liability pursuant to S.C. Code Ann. §44-7-390(1). Additionally, the broader language at S.C. Code Ann. §44-7-390(6) protects Sharing Hope’s peer reviews of any practitioners. Finally, it cannot be disputed that both Sharing Hope’s peer review materials are external reviews providing analysis or opinion

into the quality of care provided by hospital employees, agents, members of the hospital's medical staff, or other practitioners and additionally protected by S.C. Code Ann. §44-7-390(6).

The Peer Review Law then makes confidential all peer review material used in the acts and proceedings enumerated in S.C. Code Ann. §44-7-392 as follows:

(A)(1) All proceedings of, and all data, documents, records, and information prepared or **acquired by**, a hospital licensed under this article, its parent, subsidiaries, health care system, committees, whether permanent or ad hoc, including the hospital's governing body, or physician practices owned by the hospital (its parent or subsidiaries), relating to the following are confidential:

(a) **sentinel event investigations or root cause analyses**, or both, as prescribed by the joint commission or **any other organization** under whose accreditation a hospital is deemed to meet the Centers for Medicare and Medicaid Services' conditions of participation;

(b) investigations into the competence or conduct of hospital employees, agents, members of the hospital's medical staff or other practitioners, relating to the quality of patient care, and any disciplinary proceedings or fair hearings related thereto;

(c) quality assurance reviews;

...

(f) reviews or investigations to evaluate the quality of care provided by hospital employees, agents, members of the hospital's medical staff, or other practitioners; or

(g) **reports or statements, including, but not limited to**, those reports or statements to the National Practitioner Data Bank and the South Carolina Board of Medical Examiners, **that provide analysis or opinion (including external reviews) relating to the quality of care provided by hospital employees, agents, members of the hospital's medical staff, or other practitioners.**

...

(D) Any data, documents, records or information that is reported to or reviewed by the joint commission **or other accrediting bodies** must not be considered a

waiver of any privilege or confidentiality provided for in subsection (A).

There should be no question that the peer review materials prepared by Sharing Hope is an external review provided to the transplant hospital that are confidential pursuant to S.C. Code Ann. §44-7-392(A)(1)(a), (b), (c), (f), and (g). Likewise, any transplant hospital reports or other information submitted to Sharing Hope or UNOS is not considered a waiver of any privilege or confidentiality provided for in subsection (A). S.C. Code Ann. §44-7-392(D). Therefore, peer review materials shared between a transplant hospital and either Sharing Hope and/or UNOS are privileged and confidential.

Although Respondent asserts that under the Peer Review Law “[d]ata, 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”, Respondent ignores the fact that the Sharing Hope peer review materials are, in fact, not “otherwise available from original sources” S.C. Code Ann. §44-7-392(A)(3), emphasis added. This argument totally ignores that peer review materials prepared by Sharing Hope (wherein Sharing Hope would be the original source) are confidential pursuant to S.C. Code Ann. §44-7-392(A)(1)(a), (b), (c), (f), and (g) as discussed above.

C. South Carolina Jurisprudence Supports Protection of the Peer Review Materials at Issue in this Case

In McGee v. Bruce Hospital System, 312 S.C. 58, 439 S. E.2d 257 (1993), our Supreme Court recognized the need for protection of peer review materials in the following language:

[t]he overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care. See State ex rel. Shouldes v. Henry, 187 W. Va. 723, 421 S. E.2d 264 (1992). The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete control and open discussion among participants in the peer review process. Cruger v. Love, 599 So.2d 111 (Fla. 1992).

...

We find that the public interest in candid professional peer review proceedings should prevail over the litigant's need for information from the most convenient source. See Humana Hospital Desert Valley v. Superior Court, 154 Ariz. 396, 742 P.2d 1382 (Ct.App. 1987); Holly v. Auld, 450 So. 2d 217 (Fla. 1984); Hollowell v. Jove, 247 Ga. 678, 279 S.E.2d 430 (1981).

McGee v. Bruce Hosp. Sys., 312 S.C. 58, 61-62, 439 S.E.2d 257, 259-260 (1993). See also, Durham v. Vinson, 360 S.C. 639, 602 S.E.2d 760, 2004 S.C. LEXIS 219. Our Supreme Court's sound reasoning in McGee has been adopted by the Supreme Courts of Alabama, Alaska, Maryland, Michigan, Mississippi, and Tennessee. See Ex parte Krothapalli, 762 So. 2d 836, 838, 2000 Ala. LEXIS 57; Mat-Su Valley Med. Ctr. v. Bolinder, 427 P.3d 754, 767, 2018 Alas. LEXIS 139, 2018 WL 4374851; St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Assocs., P.A., 392 Md. 75, 97, 896 A.2d 304, 2006 Md. LEXIS 179; Dye v. St. John Hosp. & Med. Ctr., 230 Mich. App. 661, 669, 584 N.W.2d 747, 1998 Mich. App. LEXIS 205; Claypool v. Mladineo, 724 So. 2d 373, 385, 1998 Miss. LEXIS 601; Stratienko v. Chattanooga-Hamilton County Hosp. Auth., 226 S.W.3d 280, 285 2007 Tenn. LEXIS 460. Applying the reasoning and common law espoused in the McGee case requires a finding that the Sharing Hope peer materials remain confidential.

D. Other Jurisdictions Have Persuasively Held that Protecting Peer Review Materials is Necessary to Promote Public Policy and Interest in Improving Health Care.

The need for both candid discussion and confidentiality in the peer review process was

eloquently explained in the often-cited decision in Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249, 250 (D.D.C. 1970). In Bredice, the District of Columbia Court articulated the important policy concerns undergirding peer review statutes: “[c]andid and conscientious evaluation of clinical practices is the sine qua non of adequate hospital care...[c]onstructive professional criticism cannot occur in an atmosphere of apprehension that one doctor’s suggestion will be used as a denunciation of a colleague’s conduct in a malpractice suit.” Id. Importantly, as the court also recognized:

To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor’s suggestion will be used as a denunciation of a colleague’s conduct in a malpractice suit. The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be opened to the discovery process.

Id.

Every state and the District of Columbia has recognized the importance of peer review, as well as the need for immunity and confidentiality for the individuals and documents involved therein. It appears that most states have enacted some type of statutory limitation on the disclosure and use of peer review materials, and have extended protection to peer review committee reports, records, proceedings, and testimony. In fact, in KD ex rel. Dieffenbach v. United States, 715 F. Supp. 2d 587, 594 (D. Del. 2010), the court noted the following: “... all 50 states, as well as the District of Columbia, have created an evidentiary privilege for medical peer review information. These statutes share a common purpose in encouraging physician candidness by eliminating the

fear that peer review information will be used against them in subsequent litigation.”

Last year the Supreme Court of Pennsylvania issued a decision in Leadbitter v. Keystone Anesthesia Consultants, Ltd., 256 A.3d 1164 (Pa. 2021). Its well-reasoned decision weighs heavily in favor of reversal with regard to the documents for which Appellants claim peer review privilege. The central inquiry in Leadbitter, as it relates to this case, surrounded portions of the physician's credentialing file that involved peer review, including an Ongoing Professional Practice Evaluation Summary Report and a Professional Peer Review Reference and Competency Evaluation, which contained evaluations prepared by other physicians of a malpractice physician defendant's performance. Id. The plaintiffs claimed that the documents in question were discoverable because the documents at issue were maintained by a credentialing committee and rather than a "peer review" committee. The Supreme Court of Pennsylvania disagreed, holding that the determinative inquiry is not the title of the committee that maintains the documents in question, but instead whether that committee actually performs a peer review function. Specifically, the court held:

[A] committee which performs a peer-review function, although it may not be specifically entitled a "peer review committee," constitutes a review committee whose proceedings and records are protected... Consequently, the information redacted by the Hospital, and the documents it withheld, are not discoverable by Plaintiffs if they constitute peer review "proceedings" or "records," 63 P.S. § 425.4, in accordance with the PRPA's definition of peer review.

Leadbitter, 256 A.3d at 1177-78 (*citing* Trinity Med. Ctr. v. Holum, 544 N.W.2d 148, 155 (N.D. 1996) (indicating that the scope of a peer-review protection act should not be limited "by the name employed to describe the committee and to thereby contradict legislative intent") *and* Babcock v.

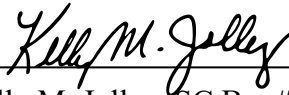
Bridgeport Hosp., 742 A.2d 322, 342 (Conn. 1999) (explaining that the privilege does not depend on the nature of the committee, but on whether it was engaged in peer review)).

In so holding, the Supreme Court of Pennsylvania again reiterated the fundamental reason for the existence of the peer review privilege: patient safety. "The purpose of this privilege system is to improve the quality of health care Thus, it is beyond question that peer review committees play a critical role in the effort to maintain high professional standards in the medical practice." Leadbitter, 256 A.3d at 1168-69 (*quoting* Reginelli v. Boggs, 181 A.3d 293, 300 (Pa. 2018)). This foundational principle, that healthcare providers should be able to focus on the medicine when conducting peer review activities – undistracted by potential legal liabilities – is the crux of this appeal. "The practice of medicine is highly complex and, as such, the medical profession is in the best position to police itself ... and, the profession's self-regulation is accomplished, at least in part, through a peer-review mechanism undertaken to determine whether a particular physician should be given clinical privileges to perform a certain type of medical activity at a hospital." Leadbitter, 256 A.3d at 1168-69 (citations omitted) (*citing* Reginelli, 181 A.3d at 300 and Cooper v. Del. Valley Med. Ctr., 654 A.2d 547, 551 (Pa. 1995)).

CONCLUSION

The trial court erred in finding that the materials created during the post-incident peer review process are not privileged and in ordering that Sharing Hope produce these protected materials to Respondent. The trial court's interpretation of the Peer Review Law ignores the plain language of the statute and the decision violates public policy by ignoring the public's strong interest in a robust peer review process which only a privileged proceeding affords. Accordingly, this Court should reverse the trial court's decision.

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