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May 24 2022
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 Case No: 2021-000487
Trial Court Case No: 2020-CP-10-02902

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

Respondent,

v.

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

Defendants,

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

Appellants.

**ASSOCIATION OF ORGAN PROCUREMENT ORGANIZATIONS' MOTION
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
IN SUPPORT OF APPELLANTS
WE ARE SHARING HOPE and UNITED NETWORK FOR ORGAN SHARING**

Pursuant to Rule 213, SCACR, the Association of Organ Procurement Organizations respectfully moves for leave to file an *amicus curiae* brief in support of Appellants. As permitted by Rule 213, SCACR, the *amicus curiae* brief is being conditionally filed with this motion.

INTEREST OF AMICUS CURIAE

The Association of Organ Procurement Organizations, (henceforth referred to as "AOPO") is the national representative of 48 federally designated, non-profit Organ Procurement Organizations ("OPOs") in the United States, which provide organ, tissue, and eye donation

services to millions of Americans. AOPO is dedicated to providing education, information-sharing, research, and technical assistance, to its member OPOs, such as Appellant We Are Sharing Hope SC (“Sharing Hope”), other stakeholders, and federal agencies to build upon this nation’s world-leading organ transplantation rates. AOPO has the singular goal that every donation opportunity be maximized in order to save as many lives as possible through donation and transplant.

AOPO has a significant interest in this appeal because each of our member Organ Procurement Organizations, including Sharing Hope, is so inextricably linked in the national process that compelling disclosure of confidential information from one OPO or UNOS itself is likely to result in a disclosure of confidential information from another actor in the process - whether hospital, OPO or UNOS. That disclosure of third-party, non-source¹ information threatens to deprive the third-party OPO or hospital of its own state’s protections and its own right to quash efforts to compel unlawful production. Put another way, when an OPO with established peer review state protections shares an organ with South Carolina, it risks losing those established protections. The risk of disclosure of otherwise protected peer review information will have a chilling effect on participation in the entire quality assurance and performance improvement process upon which OPOs rely to better serve their multiple constituents.

Thus, the determination of the trial court that such after-the-fact analyses of the OPO are not protected by the peer review privilege in South Carolina, while the Medical University of South Carolina’s after-fact-analysis is protected by the peer review privilege in South Carolina, risks

¹ For purposes of this motion and brief, the term “non-source information” refers to after-the-fact documents and information developed for or during the course of self-critical analysis, peer review, or root cause analysis.

harm to the process of knowledge-sharing that has made the national miracle of altruistic donation and life-saving transplantation possible.

Each of AOPO's members is required by federal regulation to be a member of the Organ Procurement and Transplant Network ("OPTN"), and to act in accordance with its policies, procedures rules and regulations. Currently, the OPTN is operated under a federal contract by Appellant United Network for Organ Sharing ("UNOS"), which implements the OPTN's policies and procedures, including its regulatory requirement to monitor its members for compliance, by means which include a confidential peer review process. This process is formulated pursuant to UNOS' federal contract and as addressed in the OPTN enabling regulation, the OPTN Final Rule, 42 C.F.R. 121.10(b)(1). In addition, as a condition precedent to federal certification, each OPO must adhere to the Centers for Medicare and Medicaid ("CMS") regulations which require the OPO to conduct a thorough analysis of any adverse event and must use the analysis to affect changes in the OPO's policies and practices to prevent repeat incidents. 42 C.F.R. § 486.348

Thus, AOPO's members are compelled to participate in peer-conducted root cause analysis, and quality assurance activities, in which participants share information for the sole purpose of improving the protocols by which lives are saved. Due to the complex system that underlies organ recovery and transplantation, the sharing of information across many entities, including professional specialties, hospital roles and geographic borders is necessary for the proper functioning of the system. In addition to the OPTN policies, CMS regulations, and federal laws, each OPO is governed by its home state's laws, including, among others, those pertaining to anatomical gifts, determination of death, privacy, and non-profit status.

This *amicus curiae* brief discusses these issues in more detail and demonstrates how the Court should exercise its power to protect peer review materials for the good of the unique process of

organ donation and recovery.

We believe that it is desirable for the Court to hear the amicus on this in order to comprehend the breadth of the interests at stake for all OPOs, and all transplant patients in the United States regarding this issue of peer review privilege.

May 24, 2022

Respectfully Submitted,

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STATEMENT OF THE ISSUES ON APPEAL

The Association of Organ Procurement (“AOPO”) concurs with both UNOS’ and Sharing Hope’s (“Appellants”) statements of the Issues on Appeal, which are synopsised here for the convenience of the Court.

Did the Trial Court err in granting the Plaintiff’s Motion to Compel and denying the Defendants UNOS and 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 (“OPO”) pursuant to a requirement of its membership in the federal Organ Procurement and Transplant Network (“OPTN”) and its HHS federal certification and designation be protected by a peer review privilege, especially given that an OPOs’ required interaction with the broad federal system impacts each and every other participant in that system?
- 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?

STATEMENT OF THE CASE

AOPO concurs in Appellants' Statements of the Case, which are synopsised here for the convenience of the Court.

This wrongful death action arises out of the death of Allen B. Holliman (Patient) after he underwent a double-lung transplant at the Medical University of South Carolina (MUSC) on November 27, 2018. The Personal Representative of his estate, Plaintiff, presents claims against MUSC, We Are Sharing Hope SC (Sharing Hope), and the United Network for Organ Sharing (UNOS) in connection with the process and procedures by which the organ was donated. [ROA 65; Complaint, filed July 9, 2020.] All of Plaintiff's claims are focused on the manner and method by which the transplant organs were identified as a match for the Patient – a process that involves several different organizations who are part of the United States' Organ Procurement and Transplant Network (OPTN). [Id.]

The issue on appeal arises from Sharing Hope's assertion of peer review privilege during discovery – an assertion specific to certain self-critical, peer review activities performed by Sharing Hope after the transplant at issue. UNOS has also appealed on this issue. Sharing Hope has produced all of its medical records for the Donor. It has also produced various policies and procedures, audit details, and contemporaneous communications between its employees regarding the Donor. However, Sharing Hope has objected to the production of materials generated during its post-incident peer review activities and has prepared a privilege log, as subsequently amended, listing certain documents withheld on this basis. 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. Sharing Hope asserted, and maintains, that the withheld documents are privileged under S.C. Code § 40-71-20 and/or S.C. Code § 44-7-392, because these self-evaluative and deliberative materials were created during a retrospective, self-critical quality assurance and peer review evaluation required by UNOS in connection with the Patient’s death. [ROA 179, 226, 239, 306; Exhibits A, D, H to Ex. A to Plaintiff’s November 18, 2020 Motion to Compel – Sharing Hope’s privilege logs; Ex. B to Plaintiff’s February 5, 2021 Motion to Compel – Sharing Hope’s Responses to Plaintiff’s First Set of Supplemental Requests for Production, Sharing Hope’s Third Amended Privilege Log.] In addition, Sharing Hope has asserted a privilege as to certain documents prepared as part of its participation in a retrospective review/root cause analysis conducted by Sharing Hope and the donor hospital Grand Strand Medical Center. [See Privilege Log numbered 0187-0195.]

Specific to this appeal, Plaintiff filed a motion to compel on November 18, 2020, challenging Sharing Hope’s peer review privilege assertions. [ROA 163; Plaintiff’s Motion to Compel, Nov. 18, 2020.] Plaintiff also filed a motion to compel against MUSC, seeking the same materials, on November 18, 2021. [ROA 101; Motion.] On December 15, 2020, Sharing Hope filed a related Motion for a Protective Order regarding questions posed in the deposition of Sharing Hope employee, Darla Welker, related to information about a meeting held in conjunction with the root cause analysis post-action review with the donor hospital, which is also protected by the peer review privilege. [ROA 254; Sharing Hope’s Notice Of Motion And Motion For A Protective Order.] Sharing Hope submitted memoranda in support of its motion and in opposition to the Plaintiff’s motion. [ROA 381, 386, 407; Memorandum, filed March 12, 2021, Supplemental/Reply

memorandum, filed March 15, 2021.] After reviewing the parties' written submissions, the Trial Court requested that the parties present oral argument on these Motions, which took place virtually on April 13, 2021. Thereafter, Sharing Hope submitted a supplemental memorandum as requested by the Trial Court on April 16, 2021. [ROA 456, 540; Memoranda filed April 16, 2021, and Reply filed April 19, 2021.]

In connection with these motions, Sharing Hope provided designated documents under seal for the Trial Court's *in camera* review. Thus, while there are several motions involved in this appeal, the same legal issue is involved in each of them – whether Sharing Hope's retrospective, self-critical peer review activities are protected from discovery.

The Trial Court granted the November 18th Motion to Compel against Sharing Hope, denied the Motion to Compel against MUSC, and denied Sharing Hope's Motion for a Protective Order. [ROA 10; Form 4 Order, April 13, 2021, Order, filed April 29, 2021.] The result of these Orders is that Sharing Hope was ordered to produce all of its peer review materials and to direct the witness to answer questions regarding the peer review documents, while many of the similar types of materials which were in MUSC's possession were protected.

Sharing Hope timely served and filed a notice of appeal from the April 29, 2021 Order pursuant to S.C. Code § 44-7-394 and Rule 203, SCACR. [ROA 542; NOA, served May 5, 2021.] The issue of the peer review privilege was also raised by UNOS, which filed a separate appeal. The appeals have been consolidated, but UNOS has presented its arguments in its own brief.

AOPO timely files and serves this amicus brief, accompanied by a Motion pursuant to Rule 213, SCACR.

STANDARD OF REVIEW

AOPO concurs in Appellants' Standard of Review. To wit: 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). The trial court's determination of whether or not a communication is privileged and confidential will not be overturned on appeal absent an abuse of discretion. Tobacoville USA, Inc. v. McMaster, 387 S.C. 287, 292, 692 S.E.2d 526, 529 (2010). 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. Renney v. Dobbs House, Inc., 275 S.C. 562, 564, 274 S.E.2d 290,291 (1981); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987); 16 S.C. Jur. Appeal and Error § 124.

AOPO pursuant to Rule 213, SCACR of the South Carolina Rules of Appellate Procedure and conditional on the Court's granting of AOPO' s attached motion, submits this brief as *amicus curiae* in support of Defendants/Appellants Appeal of the Trial Courts Order, filed April 29, 2021. (Henceforth referenced herein as "Order").

ARGUMENT

AOPO respectfully submits this *Amicus Curiae* brief to present its unique viewpoint as the representative of 48 non-profit organ procurement organizations ("OPOs"), who collectively form an essential part of the chain of donation and transplantation. Like Appellant Sharing Hope, each OPO is required to participate not only in the OPTN's Membership and Professional Standards Committee (henceforth "MPSC") quality review process, but also in its own quality assurance processes, which may include both the donor hospital and the transplant hospital. AOPO asks the Court to find for Appellant and reverse the trial Court's ruling for several reasons, including the unique nature of the role of OPOs in the national organ donation and transplantation system, and the important role retrospective review plays in the donation system and patient safety.

I. The Roles of Organ Procurement Organizations in the United States and the federally designated administrator of the Organ Procurement and Transplant Network, the United Network for Organ Sharing are unique within health care and have a heightened need for privilege for their non-source documents.

It is not surprising that South Carolina's specific list of entities from which privileged materials may be derived does not include OPOs. There is only one OPO in South Carolina, and only one UNOS in the United States. To truly understand the importance of an OPO's self-critical analysis to the national donation and transplant system, some explanation of that system is required.

Organ Procurement Organizations, such as Sharing Hope and the other members of *amicus* AOPO, perform a highly specialized role in the healthcare system: OPOs alone are permitted to access the donor registries where the wishes of decedents to gift their organs are housed. S.C. Code § 44-43-1450. OPOs alone are privileged to approach the families of the deceased or dying to inform them of, or obtain, the gift of a life-saving organ. 42 CFR 482.45 (a)(3). The authorization and recovery process requires extreme sensitivity and complex navigation between numerous levels of personnel within the donor hospital, including critical and palliative care doctors and nurses, ethics teams, social workers, pastoral care and legal staff. Most of the work of recovery of organs, while essential to the process of transplantation, does not actually involve the treatment of a living individual, as organ donors are deceased.

As part of its essential role in the OPTN, an OPO evaluates potential organ donors and serves as a conduit to provide information regarding the donor to transplant centers. When a donor is declared brain dead, the OPO is responsible for management of the donor's body in order to maximize organ function for optimum organ recovery in preparation for transplant. In this role, the OPO gathers the donor's pertinent medical information provided by the donor hospital and outside laboratories, which it then uploads into a database maintained by UNOS. It also

coordinates the logistics for organ recovery with the donor hospital and the transplant surgeons. The ultimate duty of every OPO is to facilitate the delivery of life-saving organs to patients on organ transplant lists throughout the United States.

OPOs perform federally-mandated activities related to organ donation and transplantation and they are an essential partner in the donation and transplantation process. OPOs' work is crucial to the success of transplantation and required by federal regulation to be subject to self-critical analysis, which analysis includes the work and perspective of numerous caring professions, and is not solely performed by physicians. For these reasons, it is not surprising that OPOs would not be included specifically by category in a list of privileged entities such as that contained in S.C. Code § 40-71-20 and S.C. Code § 44-7-392.

Within South Carolina, and in fact in most states, the only substantive statutory mention of OPOs is found in the Revised Uniform Anatomical Gift Act ("SC-UAGA"). S.C. Code § 44-43-300 *et seq.* Indeed, South Carolina statutory review reveals that other references to OPOs are limited to time-sensitive operational matters. *See, e.g.* S.C. Code §56-5-170, permitting OPO emergency vehicles to use emergency flashers. Thus, the fact that South Carolina's body of law is not replete with references to OPOs reflects the understanding that OPOs are creatures of federal law, performing a key role in the federal recovery and allocation system. Certainly, the legislature did not intend that only OPOs, of the three participants in the recovery and transplant of organs (OPOs, hospitals and physicians) would be deprived of privilege. The fact that OPOs are not specifically mentioned in the evidentiary law of any state doesn't mean that their activities are not vitally important to protect. It may reflect, however, that donation and transplant is a state and federal hybrid process, and it happens within a unique and specialized ambit, and happens with lower frequency than say, physician credentialing or gallbladder surgery. The average person does

not interact with an OPO or learn of its role until they are in need of a transplant or being asked to make a gift at the time a loved one dies in the hospital. It is not surprising that the average legislator is not mindful of the patient safety interests implicated in granting OPO peer review activities protection.

OPOs perform their organ recovery roles within a federally designated geographic service area which is comprised of all or parts of one or several states. Only one OPO may be designated for each service area. 42 CFR § 1320b-8(b)(2). While the responsibility for recovering organs is limited to donors within its designated service area, the OPO's area of operations for transporting donated organs is national. In fact, donated organs are deemed to be national resources, and they are allocated according to a national list. (National Organ Transplant Act 42 U.S.C. §§ 273 et seq.) A recovered kidney could be transplanted down the hall, or across the country, depending on recipient needs and matching criteria.

As an example, in 2020, Sharing Hope facilitated the transplantation of 221 kidneys locally within South Carolina, but also 62 kidneys nationally. See SRTR OPO-Specific Report, July 6, 2021, pp. 20-21, accessed Nov. 18, 2021 at <https://www.srtr.org/reports/opo-specific-reports/opo?code=SCOP>. In that same period, Sharing Hope facilitated the transplantation of 8 hearts locally within South Carolina and 53 hearts nationally. *Id.* at 17-18. OPOs do not operate in a vacuum and hobbling the public safety function of one OPO impacts a national life-saving network.

It is impossible to analogize the work of an OPO to that of any other entity in the healthcare system. Nothing else like it exists. OPOs are the lynchpins that hold registered donors, donor families, donor hospitals, transplant surgeons, transplant recipients and the functioning of the national allocation system together. They cannot do their work without each of those stakeholders

collaborating as part of the national Organ Procurement and Transplant Network established by Congress. 42 U.S.C. §273 et seq. (the National Organ Transplantation Act (“NOTA”)). This collaboration cannot work without constant teamwork, and full-throated and transparent self-critical review, and this review of necessity involves both those entities that South Carolina has legislatively acted to protect, and those who should be able to rely on common law protections, such as OPOs and UNOS.

II. Granting privileged status to self-critical analyses of OPOs is governed by the reasoned application of the common law.

AOPO urges the Court to protect self-critical materials that were prepared or exchanged by an organ procurement organization for purposes of enhancing patient safety, improving processes, and reducing errors. The reason these documents came into existence argues for their privilege. There is significant public interest served by the peer review process, and the unique nature of OPOs and the national transplant system compels the reasoned application of Common Law.

South Carolina has one evidentiary rule referencing privileges—Rule 501, SCORE—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.

While there are strong arguments that the documents for which privilege is sought do fit into the statutory framework of South Carolina’s peer review statutes, S.C. Code § 40-71-20, and South Carolina’s “new” or supplemental peer review statute, S.C. Code § 44-7-392, as well as that of both federal privilege and Virginia law, this brief focuses on the common law imperative to protect post-incident self-critical materials exchanged or prepared by the OPO and UNOS in this incident.

Under the plain language of this over-arching evidentiary rule, Rule 501, SCRE, the court is empowered to apply its reason and experience to the granting of privilege, except where the power to do so has been specifically carved out by statute. Thus, the power of the Court to abrogate the privilege statutorily provided to hospitals, health care systems, committees, physician practices and state or local professional societies is curtailed by statute, but the Court’s common law power to exercise its reason and experience to protect peer-review materials in the public interest remains unfettered, particularly in regard to any entity not expressly included. See, e.g. Hartsock v. Goodyear Dunlop Tires N. Am. Ltd., 422 S.C. 643, 649, 813 S.E.2d 696, 699, opinion after certified question answered 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)). The central premise of any evidentiary privilege is that in certain circumstances the public good of safely gathering and protecting information outweighs the benefit of its disclosure. In the present case, Sharing Hope’s contemporaneous donor records regarding the evaluation of the Donor and the transplant process have been provided for deciding the merits of the case (For future reference, we will refer to these documents as “source” materials.) The discovery sought by the Plaintiff, which is the subject of this Appeal, pertains not to what occurred, but rather to what peer-review participants, parties and non-parties alike, posited and surmised after the fact, and what they may have proposed to ameliorate, prevent or improve processes in the future. The documents sought are not a “rational means for ascertaining truth,” but rather an alternate means of

ascertaining what knowledgeable people, many of whom were not involved in the underlying event, may have thought about the truth, in recollection and in the context of peer review. Such musings have no evidentiary value to the case. The disparate purposes for the creation of the materials, on the one hand self-critical analysis and on the other contemporaneous operative facts, argues for the protection of the non-source documents, as does the risk their disclosure poses to the quality improvement process.

AOPO urges this Court to consider application of its previous ruling in McGee v. Bruce Hosp. Sys., to OPOs. In McGee, the South Carolina Supreme Court explicitly adopted the ruling of the Florida Supreme Court in Cruger v. Love, 599 So.2d 111 (Fla.1992) that [t]he 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. 312 S.C. 58, 61-62, 439 S.E.2d 257, 259-60 (1993).

Neither Sharing Hope, nor any OPO is a hospital, parent or subsidiary of a hospital, health care system, committee, or physician practice, as defined in South Carolina's privilege statutes. OPOs in general could not be expected to have a majority of eligible licentiates in South Carolina. (UNOS, on the other hand, does encompass the majority of the relevant practitioners in the national donation and transplant arena, thereby bolstering the argument for protection of the MPSC process.) Nevertheless, the threatened disclosure of any OPO's self-evaluative documents created for or generated during root cause analysis or quality review meetings bears an equal or greater risk to the public interest in patient safety as disclosures from any of the statutorily defined entities, and the law requires that analysis of the need for privilege does not stop at the doors of the Legislature.

III. The integrity and functioning of the nation’s organ allocation and transplant system relies upon the participation of all involved professionals in self-critical analysis and subjecting these non-source documents to disclosure in litigation risks damaging the system.

The role of privilege in the prevention of medical errors lies at the root of South Carolina’s laws on peer review privilege. In the broader context, this role came to light in the seminal publication from the Institute of Medicine in 2000, *To Err Is Human: Building a Safer Health System*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/9728>. Institute of Medicine 2000. This paper, which forms the basis for a series of studies into patient safety and medical errors, first noted the harm that fear of involvement in the legal process can do to patient safety initiatives: “Fear of legal discoverability or involvement in the legal process is believed to contribute to underreporting of errors. Collaborative quality improvement efforts may be inhibited by the loss of statutory peer review protection that may occur when data are shared across institutions. *Id.*”

It stands to reason that, just as knowing one’s telephone call is being recorded may suppress one’s speech, fear of liability may undermine effective peer review:

The erosion of the medical peer review privilege leaves physicians without adequate assurance of the confidentiality of their participation in peer review activities, thereby undermining the effectiveness of peer review.... Ultimately, physicians cannot be expected to participate candidly in peer review or error reporting activities if their identities, comments, records and recommendations are not afforded strict protection.

K. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 Mass. L. Rev. 157, 162 (2002)

Because OPOs function within a national donation system in which patient safety is paramount, it is vitally important that the peer review system in South Carolina protect the organ donation and transplantation partners who provide services here, regardless of their home state.

The work of the donation and transplant team includes donor hospital personnel, the OPO, and the transplant center, all working with UNOS to collect the data that informs the nation's policies, and to implement quality assurance and improvement activities required by federal regulation. Within the context of quality improvement, safe from external disclosure, each one of these players may, upon *post hoc* analysis and reflection, contribute some insight, some suggestion, some mode of improvement that impacts not only how many people receive organs, but how many donors give them. The free sharing of learning from actual cases has the sole purpose of improving quality and saving more lives through transplantation.

But participants will not contribute these insights if by their very participation they are giving an aggrieved person, a person whose perspective is not focused on improvement, but rather on the assignment of liability, the means by which to focus blame. The risk of participation in the peer review process is not only on the peer review participant, but on his or her peers. Not only in the participant's own jurisdiction, with the predictability of their own laws, but under the law of another, unpredictable jurisdiction, wherever the gifted organ may have found a home. Should self-critical analysis documents be at risk of disclosure, donation professionals looking to shape system improvements will be restrained by the fear that what one *posits*, and not just what one *does*, can and will be used against one in a court of law.

IV. The national system of donation and transplantation not only relies upon, but mandates OPO participation in fully transparent peer review, and fairness dictates that common law privilege protects each OPO's participation.

By subjecting the self-critical documents of even one OPO and UNOS, to disclosure in this one civil case, the self-critical analysis process of every other OPO in the country is threatened. This is not only because of the influence of the South Carolina courts, but because every other OPO might have an organ to offer a South Carolina patient today. See, *infra*, page 9. The life of

that South Carolina patient who is waiting for an organ depends upon the work of every other OPO in the country, and on the computers and oversight of UNOS, and most importantly, on the selfless generosity of organ donors throughout the country. What's more, the waiting South Carolina patient trusts that the organ procurement process, wherever performed, is subject to rigorous review, and as free from error as possible. That is the nature of the national allocation system. It is palpably unfair to those OPOs that they might be held to a lower standard of privilege than either their own states afford, or that is afforded to the transplant hospital, or the transplant physicians who depend on them.

OPOs have no choice but to provide organs to the most needy and suitable patient on the national list, regardless of where he or she might live. It is the position of AOPO that this mandate to serve every person in every state is a welcome burden. In return, the members of AOPO request only that their quality improvement processes be protected by the privileges generally provided to such processes in each of the forums they serve.

Similarly, an OPO, in this case AOPO-member Sharing Hope, participated in the UNOS peer review-led MPSC process because it wanted to, but also because, without participation in this peer review process, Sharing Hope would have likely lost its OPTN membership and designation by the Secretary of the U.S. Department of Health and Human Services, and therefore its ability to recover organs for transplant in the United States.

Baldly stated, neither Sharing Hope nor any OPO could ever be in the position of stating "We'd rather not provide an organ to a South Carolinian, or perform a root cause analysis, or participate fully in the UNOS process, because we might be subjecting ourselves and every health care professional involved with us to scrutiny of our self-critical analysis." As organizations with a vital role to play, AOPO's members participate in rigorous self-critical analysis for the public

good. Like all other members of the organ donation and transplantation peer review team, however, their participation should be focused on the public good, and not the purposes of private litigation. Peer review materials confer no benefit to the plaintiffs, but their disclosure threatens great harm to an effective and federally mandated peer review system. Subjecting the light of vigorous self-critical analysis to the shadow of civil disclosure is not only unfair when such disclosure is being compelled, but, far worse, actively harms the public benefit such processes are designed to further. Peer review *is* patient safety, and it is our shared goal.

CONCLUSION

Therefore, AOPO respectfully urges the Court to correct the error of the trial court and hold in favor of Appellants on all issues before it.

May 24, 2022

Respectfully Submitted,

/s/Christine Toporek

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*Counsel for Amicus Curiae, Association of Organ
Procurement Organizations*

RECEIVED

May 24 2022

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 Case No: 2021-000487
Trial Court Case No: 2020-CP-10-02902

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

Respondent,

v.

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

Defendants,

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

Appellants.

Certificate of Service

The undersigned certifies that on this 24th day of May 2022, a copy of the Association of Organ Procurement Organizations' Motion for Leave to File *Amicus Curiae* Brief In Support Of Appellants We Are Sharing Hope And United Network For Organ Sharing upon other counsel of record, by e-mailing same to the following:

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May 24, 2022

RECEIVED
May 24 2022
SC Court of Appeals

Via E-Filing

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

Re: Michelle Cha Holliman, individually and as Personal Representative of the Estate of Allen B. Holliman v. We Are Sharing Hope SC, Medical University of South Carolina, United Network for Organ Sharing, Jacqueline Honig, M.D., and Darla Welker, Of which We Are Sharing Hope SC and United Network for Organ Sharing are the Appellants
C.A. No.: 2021-000487

Dear Ms. Kitchings:

Enclosed please find the Association of Organ Procurement Organizations' Motion for Leave to File *Amicus Curiae* Brief In Support Of Appellants We Are Sharing Hope And United Network For Organ Sharing and Certificate of Service in connection with the above referenced matter.

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

With kindest regards, I am

Sincerely,

ROGERS TOWNSEND, LLC

A handwritten signature in black ink, appearing to read "Christine K. Toporek".

Christine K. Toporek

CKT/ylt
Enclosures: as stated

cc: James H. May, Esquire
John C. Moylan, III, Esquire
Mary Lucille Dinkins, Esquire
Jack G. Gresh, Esquire
Lauren Spears Gresh, Esquire
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