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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2021-NI-04-00011
Appellate Case No. 2021-001129

Anita and James Chabek, ... Appellants,

v.

AnMed Health and Larry Davidson, M.D., ... Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 213 of the South Carolina Appellate Court Rules, the South Carolina Hospital Association ("SCHA") seeks leave to file this *amicus curiae* brief in the above-captioned matter. In support of this Motion, the SCHA states the following:

1. The SCHA is a private, not-for-profit organization comprised of approximately 100 member hospitals and healthcare systems and about 900 personal members associated with the institutional members. The SCHA was created in 1921 to serve as the collective voice of the state's hospital community. The SCHA's mission is to advance healthcare delivery and access, promote the highest standards of patient care, and advocate for the interests of member institutions.

2. The SCHA seeks leave to file an *amicus curiae* brief because this Court's ruling could potentially have a dramatic impact on an issue of primary importance to its members: whether a medical provider has an affirmative duty to disclose the provider's own history of mental health, substance abuse, or alcoholism issues to a patient during the patient's informed consent process prior to a medical procedure or decision. This issue directly impacts the medical community's ability to provide effective and ethical care to patients while preserving and promoting the provider-patient relationship. The SCHA seeks to provide insight into the complexities and public policy surrounding this issue and the potential ramifications of imposing such a duty that has never been recognized under South Carolina law and that has been rejected by most jurisdictions around the country that have considered it.

The SCHA, therefore, seeks leave to file the enclosed *amicus curiae* brief (**Exhibit 1**).

Respectfully submitted,

s/ Edward H. Bender

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August 21, 2023

EXHIBIT 1

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Anita and James Chabek, ... Appellants,

v.

AnMed Health and Larry Davidson, M.D., ... Respondents.

BRIEF OF THE SOUTH CAROLINA HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

---

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Statement of Interest of *Amici Curiae*

We, the South Carolina Hospital Association ("SCHA"), respectfully submit this Brief as *amici curiae* in support of the Respondents in this matter. The Respondents have consented to the filing of this Brief.

The SCHA is a private, not-for-profit organization comprised of approximately 100 member hospitals and healthcare systems and about 900 personal members associated with the institutional members. The SCHA was created in 1921 to serve as the collective voice of the state's hospital community. The SCHA's mission is to advance healthcare delivery and access, promote the highest standards of patient care, and advocate for the interests of member institutions.

The SCHA is particularly interested in this case because of its potential impact on an issue of primary importance to its members: whether a medical provider has an affirmative duty to disclose the provider's own history of mental health, substance abuse, or alcoholism issues to a patient during the patient's informed consent process prior to a medical procedure or decision. This issue directly impacts the medical community's ability to provide effective and ethical care to patients while preserving and promoting the provider-patient relationship. The SCHA seeks to provide insight into the complexities and public policy surrounding this issue and the potential ramifications of imposing such a duty that has never before been recognized under South Carolina law and that has been rejected by most jurisdictions around the country that have considered it.

Summary of Argument

The SCHA contends that a medical provider should have no affirmative duty under South Carolina law to disclose to a patient as a prerequisite for obtaining the patient's informed consent the provider's own personal history of mental health, alcoholism, or substance abuse issues.

Creating such a duty would not only infringe upon a provider's right to privacy but also discourage providers from seeking treatment, impose an administrative burden on hospitals and medical offices across the state, decrease the attractiveness of the practice of medicine in South Carolina, erode trust between medical providers and patients, and fail to enhance the informed consent process. Furthermore, creating such a new duty would undoubtedly open a proverbial "can of worms" that could prove difficult to contain and regulate effectively.

Argument

I. THE SOUTH CAROLINA MEDICAL PROFESSION ALREADY HAS ROBUST AND ADEQUATE PROCESSES IN PLACE TO PROTECT THE PUBLIC FROM IMPAIRED AND/OR MENTALLY-ILL MEDICAL PROVIDERS.

No reasonable medical provider or organization would argue that medical providers in the state of South Carolina should practice medicine while impaired and/or suffering a mental health issue that would negatively impact the provider's ability to provide appropriate medical care. The SCHA agrees and is not suggesting in this Brief that an impaired medical provider escape legal liability if a patient is able to prove by a preponderance of the evidence that an impaired provider proximately harmed the patient. However, a central issue before this Court is whether the South Carolina legal doctrine of informed consent should be expanded to create a new duty to disclose that has never before existed in this state.

The SCHA's position is that the medical profession already has adequate mechanisms in place to ensure that medical providers are fit to practice medicine and that this Court should not impose a duty to disclose the provider's own history of mental health, alcoholism, or substance abuse issues. For instance, South Carolina medical licensing boards already require extensive applications and background checks as part of their processes to approve medical licenses in this

state. Providers who are found to be impaired by mental health, alcohol, or substance abuse issues can have their licenses suspended and/or revoked. Hospitals and other medical providers/employers also already have policies and procedures in place to impose upon their employees a duty to report providers suspected of being impaired and/or providing substandard medical care.

The American Medical Association has published, in Opinion 9.3.2, an ethical guideline which states, in part, that physicians should:

1. Maintain their own physical and mental health, strive for self-awareness, and promote recognition of and resources to address conditions that may cause impairment.

2. Seek assistance as needed when continuing to practice is unsafe for patients, in keeping with ethics guidance on physician health and competence.

3. Intervene with respect and compassion when a colleague is not able to practice safely. Such intervention should strive to ensure that the colleague is no longer endangering patients and that the individual receive appropriate evaluation and care to treat any impairing conditions.

4. Protect the interest of the patient by promoting appropriate interventions when a colleague continues to provide unsafe care despite efforts to dissuade them from practice.

5. Seek assistance when intervening, in keeping with institutional policies, regulatory requirements, or applicable law.

For all of the above reasons, as well as those articulated below, it is the SCHA's position that creating a legal duty for providers to disclose their own personal health history to patients is unnecessary and would do substantially more harm than good.

II. THE CREATION OF A NEW DUTY TO DISCLOSE WOULD INVADE MEDICAL PROVIDERS' PRIVACY RIGHTS, RESULT IN DISCRIMINATION AGAINST THOSE WITH A HISTORY OF MENTAL HEALTH OR SUBSTANCE ABUSE ISSUES, AND WOULD OFTEN BE IRRELEVANT TO PATIENT CARE.

Expanding the current informed consent laws in this state would significantly jeopardize the fundamental right to privacy to which medical providers, like all individuals, are entitled. Medical providers have a right to maintain their personal privacy and dignity, safeguarding their personal struggles from undue intrusion. Alcoholism, mental illness, and substance abuse issues are private matters deserving protection from disclosure in order to promote treatment and recovery. Creating a new duty to disclose would erode providers' privacy and could lead to a chilling effect on open communication and the free exchange of information between patients and medical professionals, ultimately undermining the trust essential for effective healthcare delivery and the medical provider-patient relationship.

Creating a new duty to disclose could also foreseeably lead to discrimination against medical providers who have overcome past mental health, alcoholism, and/or substance abuse issues. Even if a provider has successfully overcome a mental health or substance abuse problem, the stigma associated with these conditions could lead patients to refuse treatment from them. This could have serious implications for the provider's career, livelihood, and even cause a provider to relapse.

Requiring the disclosure of a provider's personal health history would often be irrelevant to patient care. A provider's ability to deliver effective treatment is determined by the professional's education, qualifications, skills, and experience, not their personal health history. A provider who has successfully managed their own mental health or substance abuse issues may be just as capable, if not more so, of providing high-quality care as a provider who has never faced these issues. It is generally understood and accepted in the medical field that the focus of the informed consent process should be on the patient, not the provider. The purpose of informed

consent is to ensure that the patient understands the risks, benefits, and alternatives of a proposed treatment or procedure. Requiring providers to disclose their own personal health history would often distract from this purpose and potentially confuse and/or overwhelm patients.

III. DISCOURAGEMENT OF TREATMENT-SEEKING OF MEDICAL PROVIDERS.

Confidentiality is an essential element for the proper identification of, treatment of, and recovery from alcoholism, substance abuse, and/or mental illness issues. Patients obviously want to be sure that impaired medical providers, incapable of practicing reasonable and appropriate medicine standards, are identified and obtain the proper treatment they need. However, requiring medical providers to disclose to their patients the provider's own history of mental health or substance abuse issues would be counterproductive to achieving such a goal. Mandating the disclosure of such private struggles or addictions could lead to stigma, discrimination, and a reluctance among healthcare professionals to seek the help they need, due to a fear of jeopardizing their careers, reputations, and patient relationships. Furthermore, even if a medical provider does seek treatment, expanding the informed consent requirements may discourage treating providers from being honest with licensing boards, hospital boards, and patients about their treatment of underlying issues or conditions, if doing so would potentially result in career-altering repercussions.

IV. ADMINISTRATIVE BURDEN FOR HOSPITALS AND MEDICAL OFFICES.

Expanding informed consent duties and obligations under South Carolina law to encompass the mandatory disclosure of personal health history would impose a substantial

administrative burden on hospitals and medical offices, creating the likely need for complex systems of monitoring, rules, regulations, and policies which would demand substantial resources to implement and maintain. Hospitals would certainly face increased costs due to administrative oversight, litigation, and loss of staff.

The healthcare field is already grappling with administrative complexities, and the addition of such requirements would exacerbate the strain on healthcare systems. The necessity to develop, oversee, and enforce new legal responsibilities would divert resources away from direct patient care, hinder medical innovation, and diminish providers' ability to focus on critical medical decisions. Moreover, the introduction of extensive monitoring measures would likely have a negative effect on healthcare professionals, impeding their ability to provide effective care and potentially leading to an environment of apprehension and defensive medicine. Balancing patient safety and ethical practices must be accompanied by a pragmatic approach that considers the potential burdens and unintended consequences of imposing new duties and responsibilities on an already administratively complex healthcare landscape.

V. NEGATIVE IMPACTS ON MEDICAL WORKFORCE ATTRACTIVENESS AMID EXISTING PHYSICIAN AND NURSING SHORTAGES IN SOUTH CAROLINA.

The implementation of new informed consent duties and responsibilities mandating the disclosure of medical providers' personal mental health and substance abuse histories would render the practice of medicine in South Carolina less attractive for medical providers looking to move to this state. At a time when the state is already grappling with a decreasing number of physicians and nurses, such a requirement could act as a deterrent for prospective healthcare professionals considering South Carolina as their practice location. The field of medicine is highly competitive, and the prospect of facing potential stigma or discrimination due to past personal

struggles could dissuade talented individuals from pursuing careers in this state. This, in turn, would exacerbate the existing healthcare workforce shortage, negatively impacting patient access to quality care and place additional strain on an already-overstretched healthcare system. As South Carolina seeks to maintain and enhance its healthcare workforce, it is crucial to consider policies that encourage, rather than discourage, the recruitment and retention of skilled medical professionals.

Furthermore, imposing new informed consent requirements on the medical field could result in an erosion of trust within the medical community, potentially deterring individuals from pursuing or remaining in healthcare professions altogether. It could also deter potential students from pursuing medical education due to fear of future disclosure of personal struggles and health issues. A change of this nature would not only impact the well-being of medical providers but could also compromise patient care as providers grapple with navigating the complex balance between personal privacy and ethical responsibility.

VI. UNINTENDED CONSEQUENCES OF EXPANDING INFORMED CONSENT.

A change of this magnitude could open up a proverbial "can of worms" that could prove difficult to contain and regulate effectively. Such an expansion of the informed consent doctrine in South Carolina could lead, for instance, to subjective and challenging questions about which aspects of a medical provider's personal history must be disclosed and which can be considered irrelevant to the medical procedure at hand. The result could be a convoluted and unpredictable system that lacks clear boundaries and guidelines. This would not only create confusion and inconsistencies among medical providers and hospitals, but also complicate the informed consent

process itself, potentially undermining its intended purpose of facilitating informed decision-making.

VII. THE SOUTH CAROLINA BOARD OF MEDICAL EXAMINERS' ALIGNMENT WITH OUR POSITION.

The South Carolina Board of Medical Examiners ("SCBME"), through recent changes to its questioning in physicians' licensure application, has explicitly demonstrated an alignment with the SCHA's position in this matter that disclosure of a medical provider's personal mental health and/or substance abuse history should be carefully measured. A current question on the SCBME License Application or Renewal states in its entirety:

> Since your last renewal (or if this is your first renewal since your initial license application), have you experienced any physical or mental disease or condition, including an addiction to drugs or alcohol, that currently interferes with your ability to competently and safely perform the essential functions of practice? (**If you are voluntarily enrolled in the Recover Professionals Program (RPP) and have remained in full compliance, you may answer "No" with respect to any condition involving abuse of alcohol or drugs. If you have a physical or mental disease or condition that is appropriately being treated and does not currently impair your judgment or otherwise adversely affect your ability to practice, you may answer "No."**)

Question 8, Personal History Information Section, www.llr.sc.gov/med/Pdf/ApplicationsForms/MDDOPermLic.pdf. (Emphasis added.)

As implied with the above question and examples of appropriate responses, the Board of Examiners has taken the position that the issue of central importance is whether the medical provider (or prospective medical provider) is able to "competently and safely perform the essential functions of practice," not whether the medical provider has ever had any mental health or substance abuse issues.

By not requiring exhaustive disclosure of past personal addictions to drugs or alcohol, or

experiences with physical or mental diseases, the Board has recognized the potential detrimental impact of excessive intrusion into physicians' private lives, their well-being, and the medical provider-patient relationship. This stance signifies a well-informed and pragmatic approach to ensuring both competent medical practice and a safeguarding of provider rights, aligning with the broader legal and ethical considerations surrounding informed consent and medical ethics. With this approach, the Board also encourages medical providers with these types of issues to seek out help to be able to work to the best of their ability with the best interests of the patient in mind.

VIII. LEGAL PRECEDENT ACROSS THE COUNTRY EXCLUDES MEDICAL PROVIDERS' PERSONAL MEDICAL HISTORY FROM INFORMED CONSENT REQUIREMENTS.

Numerous courts have held that a medical provider's history of substance abuse does not need to be disclosed to a patient to obtain informed consent. In Albany Urology Clinic, P.C. v. Cleveland, 528 S.E.2d. 777 (Ga. 2000), the Supreme Court of Georgia held that a physician was under no affirmative obligation, either under Georgia informed consent statute or common law, to disclose illegal drug use to patients prior to rendering services, and thus, the failure to make such disclosure could not be basis for an independent cause of action for fraud or battery. The medical provider's failure to disclose "negative personal life factor [history of cocaine use] that, although not directly related to the professional relationship, may, depending upon a patient's subjectively held beliefs, impact upon the patient's consent" where there was no evidence that the physician was under the influence of cocaine at the time of treatment. Id. The Georgia Court of Appeals in Williams v. Booker, 310 Ga.App. 209, 712 S.E.2d 617 (Ga. Ct. App. 2012), held that neither the physician nor the hospital had a duty to disclose the physician's alcohol abuse to the patient. In Mau v. Wisconsin Patients Compensation Fund, 266 Wis.2d 1059, 668 N.W.2d 562 (Ct. App.

2003), the Court of Appeals of Wisconsin denied an informed consent claim where a doctor with a history of substance abuse had not been using drugs before treating the patient and was not operating under the influence at the time of the operation. In Kaski v. Wright, 589 A.2d 213 (Pa. Sup. Ct. 1991), the court refused to expand the doctrine of informed consent to cases where the plaintiffs were actually informed of the "particular procedures," but were not informed of "facts personal to the treating physician" like alcoholism.

Furthermore, most courts around the country hold that disclosure of a physician's personal history is not required, even where those characteristics arguably increase the medical risk to the patient. See e.g. Curran v. Buser, 271 Neb. 332, 711 N.W.2d 562 (2006) (finding that the standard of care did not require disclosure of physician's disciplinary history when obtaining informed consent); Cipriano v. Ho, 29 Misc.3d 952, 908 N.Y.S.2d 552 (N.Y. Sup. Ct. 2010) (noting lack of common law to support an informed consent claim based on failure to disclose prior restriction of physician's surgical privileges); Duttry v. Patterson, 771 A.2d 1255 (Pa. 2001) (holding that "evidence of a physician's personal characteristics and experience is irrelevant to an informed consent claim").

The above-cited cases provide insights into how other jurisdictions have grappled with the delicate balance between patient autonomy, physician privacy, and the scope of required disclosures and have ultimately led to other jurisdictions deciding not to expand the informed consent doctrine in the manner sought by the Appellants in this matter.

Conclusion

The SCHA respectfully urges this Honorable Court to carefully consider the potential consequences of imposing an affirmative duty on medical providers to disclose personal history,

including alcoholism, substance abuse, and/or mental health issues, when seeking informed consent from patients. Balancing patient autonomy, physician privacy, and effective medical care is crucial for upholding the principles of ethical healthcare delivery. Imposing such a duty would have far-reaching consequences for the medical community as a whole and the patients it serves. The attempt to solve this issue by expanding the scope of disclosure obligations under the informed consent doctrine would be both impracticable and counterproductive.

For all of the reasons enunciated above, as well as those in the Respondents' filed briefs, this Court should affirm the lower court's decision to dismiss Appellants' claims, in part due to Appellants' misplaced arguments regarding a desired expansion of the informed consent doctrine in this state.

Respectfully submitted,

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APPEAL FROM ANDERSON COUNTY
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THE HONORABLE R. LAWTON McINTOSH
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2021-001129
CIVIL ACTION NOS. 2021-NI-04-00011 and 2021-CP-04-01458

Anita and James Chabek,

APPELLANTS,

versus

AnMed Health and Larry Davidson, MD,

RESPONDENTS.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Amicus Curiae of South Carolina Hospital Association complies with Rule 211(b), SCACR.

Respectfully submitted,

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August 21, 2023
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CERTIFICATE OF SERVICE

I, the undersigned, attorney for the Amicus Curiae, South Carolina Hospital Association, do hereby certify that I have this date served the Motion for Leave to File an Amicus Curiae Brief on Behalf of the South Carolina Hospital Association in Support of Respondent's Final Brief dated May 16, 2022, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022, on the following counsel of record using the email addresses listed in the Attorney Information System (if applicable):

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A copy of the sent email is enclosed with this Certificate of Service.

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Date August 21, 2023

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Subject:	2021-001129 Chabek v. AnMed Health and Larry Davidson, M.D.
Attachments:	Mtn for Leave to File Amicus Brief Chabek v. AnMed Health.pdf

Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you the motion for Leave to File an *Amicus Curiae* Brief on behalf of the South Carolina Hospital Association in Support of Respondent's Final Brief.

Please let me know if you have any questions.

Thank you.

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August 21, 2023

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Via e-mail (ctappfilings@sccourts.org)
The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Chabek v. AnMed Health and Larry Davidson, M.D.
Case No. 2021-NI-04-00011
Appellate Case No.: 2021-001129

Dear Ms. Kitchings:

Enclosed for electronic filing is the Motion for Leave to File an *Amicus Curiae* Brief on Behalf of the South Carolina Hospital Association in the above-referenced case, along with our Certificate of Service. We are filing this Motion electronically with the Court of Appeals via e-mail at ctappfilings@sccourts.org pursuant to Section (b)(2) of the Supreme Court's May 6, 2022 Order.

We have mailed our $50 filing fee to the above-referenced P.O. Box number.

We have served this Motion on counsel of record in the appeal upon their primary email addresses listed in the Attorney Information System.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

/s Edward H. Bender

Edward H. Bender

Attachment

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