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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

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate No. 2021-001129

Anita and James Chabek, ……Appellants,

v.

AnMed Health and Larry
Davidson, MD,…….Respondents.

AMICUS CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE SOUTH CAROLINA MEDICAL ASSOCIATION IN SUPPORT OF THE RESPONDENTS ANMED HEALTH AND LARRY DAVIDSON, MD

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STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to Rule 213, SCACR, Amici Curiae, the American Medical Association ("AMA") and the South Carolina Medical Association ("SCMA"), file this Amicus Curiae Brief in Support of the Respondents AnMed Health and Larry Davidson, MD. The Respondents have consented to the filing of this brief.

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state, including South Carolina.

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.

The AMA and SCMA join this brief on their own behalf and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

Each Amicus Curiae has a unique and substantial interest in the issues presented by the instant case and believe strongly that existing law sufficiently balances the privacy rights of physicians as to their own personal, medical, or behavioral issues with a physician's duty to disclose under the existing doctrine of "informed consent".

The AMA and 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 upheld. We believe that the Court should hear the AMA and SCMA on this issue, given the breadth of the interests at stake for all physicians and patients in South Carolina.

STATEMENT OF THE FACTS

This medical malpractice case involves an appeal by spouses Anita and James Chabek whose claims against Respondents were dismissed because the statute of limitations barred the claims and because "South Carolina does not recognize a duty on the physician which extends to disclosure of his or her own personal, medical or behavioral issues." (R.p. 17). The underlying lawsuit arose after Antia Chabek underwent a spinal surgery on August 22, 2017, performed by Larry Davidson, MD ("Dr. Davidson"), a neurosurgeon with AnMed Health ("AnMed). In her lawsuit, Ms. Chabek asserted causes of action for (1) medical negligence, (2) lack of informed consent, (3) negligent supervision, and (4) general negligence. The appellants additionally alleged that Dr. Davidson is an alcoholic and had a duty to inform them of the same as part of his "informed consent" responsibilities despite the court finding Dr. Davidson having documented his disclosures as follows:

> he thoroughly discussed the technical aspects of the procedure, the potential risks, and realistic limitations and benefits with Mrs. Chabek, and risks specifically

> documented to have been discussed by Dr. Davidson include infection, wound healing difficulties, hemorrhage, CSF leak, recurrence of symptoms, spinal destabilization, paralysis, nerve injury, worsening of symptoms or neurologic status, and need for subsequent surgery for any of the above complications, and he also discussed that there was no guarantee that the desired results would be obtained with surgery as well as the potential development of medical problems during and following surgery.

(R.p. 8). In his November 17, 2021, Order Granting [Respondents'] Motions for Summary Judgment, The Honorable R. Lawton McIntosh, Circuit Court of the Anderson County Court of Common Pleas, issued the following well-reasoned ruling that is the focus of interest for this brief:

> Under the doctrine of informed consent, a physician in South Carolina has a duty to disclose "(1) the diagnosis, (2) the general nature of the contemplated procedure, (3) the material risks involved *in the procedure*, (4) the probability of success associated with the procedure, (5) the prognosis if the procedure is not carried out, and (6) the existence of any alternatives to the procedure." Hook v. Rothstein, 281 S.C. 541, 547, 316 S.E.2d 690, 694-95 (Ct. App. 1984) (emphasis added). The Plaintiffs' claims related to lack of informed consent center upon the third element, that of disclosure of "material risks involved in the procedure." However, this element pertains to risks of the procedure itself, not to risks related to the surgeon's health or behavior. A surgeon's personal issues, whether behavior or medical, are not required to be disclosed under the doctrine of informed consent. This Court will not permit Plaintiffs to expand the doctrine of informed consent beyond the elements that our appellate courts have already outlined.
>
> …
>
> Expanding the doctrine of informed consent as Plaintiffs request this Court to do would be opening a never-ending Pandora's box. Would a surgeon have to disclose that he was going through a nasty divorce or that his teenage child was admitted to a psychiatric facility? Would she have to disclose that she was undergoing chemotherapy for stage 4 breast cancer or that she was a diabetic who occasionally experienced low sugar levels? Certainly, such subjective and difficult to delineate matters are not what our Court contemplated when recognizing the doctrine of informed consent. Instead, the Court laid out six very specific elements of informed consent. The surgeon's life factors are not one of those elements.
>
> This Court finds that Plaintiffs' allegations related to Dr. Davidson's failure to disclose his alcohol abuse seek to expand the doctrine of informed consent beyond reasonable bounds. Dr. Davidson had no such duty of disclosure.

(R.p. 17, 19-20).

SUMMARY OF ARGUMENT

The trial court correctly declined to create a new duty upon physicians under South Carolina law requiring them to disclose to a patient as a prerequisite for obtaining the patient's informed consent the provider's own personal, medical, or behavioral issues. Existing law sufficiently protects patients from physicians actively practicing medicine while impaired and preserves the privacy rights of physicians as to their own personal, medical, or behavioral information.

To be abundantly clear, neither **the AMA nor SCMA condone Physicians practicing if their ability to do so safely is impaired by substance abuse or a health condition**. The new law and new duty appellants are asking this Court to create, however, goes far beyond creating guard rails against this type of behavior, guard rails which already exist in law, and instead are seeking to impose a duty that would cause far more harm than good. Creating such a duty would unreasonably infringe upon a physician's right to privacy, would discourage physicians from seeking treatment for fear that they may have to disclose as a part of informed consent any diagnoses or treatment they may receive, and would create an arbitrary standard impossible to police that could reach into all crevices of a physician's life, pressing policy matters well documented in existing law.

ARGUMENT

A. The trial court correctly declined to create a new, expanded duty upon physicians under the guise of informed consent.

The trial court correctly declined to create a new duty upon physicians under South Carolina law requiring them to disclose to a patient the provider's own personal, medical or behavioral issues to obtain the patient's informed consent when existing law sufficiently protects

against impaired physicians actively practicing medicine. Under the doctrine of informed consent, a physician in South Carolina who performs a diagnostic, therapeutic, or surgical procedure must disclose to a patient of sound mind, in the absence of an emergency that warrants immediate medical treatment: "(1) the diagnosis, (2) the general nature of the contemplated procedure, (3) the material risks involved *in the procedure*, (4) the probability of success associated with the procedure, (5) the prognosis if the procedure is not carried out, and (6) the existence of any alternatives to the procedure." Hook v. Rothstein, 281 S.C. 541, 547, 316 S.E.2d 690, 694-95 (Ct. App. 1984) (emphasis added); see also Melton v. Medtronic, Inc., 389 S.C. 641, 656, 698 S.E.2d 886, 894 (Ct. App. 2010).

Further, in Hook, this Court adopted what is commonly referred to as the professional medical standard of informed consent involving "medical judgment" rather than a lay standard. Under this professional standard, "the physician is required to disclose those risks which a reasonable medical practitioner of like training would disclose under the same or similar circumstances…." Hook, 281 S.C. at 548-53, 316 S.E.2d at 695-98. Furthermore, "the questions of whether and to what extent a physician must disclose a particular risk are to be determined by expert testimony which establishes the prevailing standard of practice and the physician's departure from that standard." Id.

Simply put, a physician's duty requires the disclosure of "the material risks inherent in a proposed treatment or procedure." Id. at 553, 316 S.E.2d at 698. No appellate opinion in South Carolina has expanded this common law duty to require a physician to disclose the physician's own personal, medical, or behavioral issues under the guise of meeting his or her existing informed

consent obligation. Under the plain language of Hook, there currently exists no such duty and, as the trial court correctly held, there should be no additional duty.

B. Other Jurisdictions Have Persuasively Held that Disclosure of a Physician's Own Personal, Medical, or Behavioral Issues is Not a Required Element of Informed Consent.

Appellants noted that "[t]he circuit court correctly noted South Carolina courts have not specifically ruled on whether a surgeon's active alcoholism is a 'material risk' that must be disclosed to provide informed consent." Appellants' Initial Brief at p. 18, citing R. p. 17. However, the bulk of other jurisdictions that have considered this exact question, have persuasively held that disclosure of a physician's own personal, medical, or behavioral issues is not required in informed consent.[1] In Albany Urology Clinic, P.C. v. Cleveland, 528 S.E.2d. 777 (Ga. 2000), the Supreme Court of Georgia held that a physician had no duty, either under statute or common law, to disclose a history of illegal drug use to patients before rendering services. Thus, the failure to disclose such could not be the basis for an independent cause of action. The court noted the

[1] Appellants' Reply Brief criticizes Respondents for not addressing the case they cite to wherein a court held that alcoholism must be disclosed to obtain informed consent. See Hidding v. Williams, 578 So.2d 1192 (La. App. 1991). We note that Hiddings is a 1991 opinion from the Fifth Circuit Court of Appeals of Louisiana, which is comprised of just four parishes. https://www.fifthcircuit.org/history.aspx (last visited Aug. 30, 2023). Furthermore, Hiddings involved a surgery that took place in 1984 and was based upon the state's then in effect informed consent statute, LSA-R.S. 40:1299.40 (repealed by *Acts 2012, No. 759*, *§3*, eff. 6/12/2012). The surgery also predates a 1990 Amendment creating "The Louisiana Medical Disclosure Panel" which was created specifically "to determine which risks and hazards related to medical care and surgical procedures must be disclosed by a physician or other health care provider to a patient or person authorized to consent for a patient" by La. Acts 1990, No. 1093 and provides a third way for physicians to obtain informed consent via provisions of lists prepared by the panel. LA Rev Stat § 40:1157.2(B)(1) (2015). Thus, it is unclear what, if any, impact the Hidding holding retains even in the Louisiana's Fifth Judicial Circuit, and Appellants' reliance on the decision is overdone.

following public policy concerns in support of its decision that physicians are not under "a duty to make any disclosures regarding [their] personal life factors":

> First among these is the impossibility of defining which of a professional's life factors would be subject to such a disclosure requirement. Indeed, in arguing before this Court, Cleveland concedes that because every situation is different, and because every patient or client has unique sensibilities, it would be impossible to say what a professional is required to disclose in any given professional relationship. This concession highlights the difficulty of ascertaining standards that would guide both professionals and their clients if such a new disclosure requirement existed, and underscores the fact that such standards would, in large part, be based upon a plaintiff's subjective beliefs and standards.

Id. at 781-782. Furthermore, a "full and adequate remedy [was] already provided by existing law -- the right to sue … for professional negligence." Id. at 780. Shortly thereafter, the Georgia Court of Appeals in Williams v. Booker, 310 Ga.App. 209, 712 S.E.2d 617 (Ga. Ct. App. 2011), held that neither the physician nor the hospital had a duty to disclose the physician's alcohol abuse relapse to the patient before her laparoscopic cholecystectomy.

Likewise, in Kaski v. Wright, 589 A.2d 213 (Pa. Sup. Ct. 1991), the Superior Court of Pennsylvania focused its inquiry on "whether the doctrine of informed consent can be expanded to include information other than that which concerns medical treatment by surgical procedure." The court refused to expand the doctrine of informed consent to require disclosure of alcoholism, a fact personal to the treating physician, as follows:

> [W]e … refuse to expand the informed consent doctrine to include matters not specifically germane to surgical or operative treatment. To do so, where the absent information consists of facts personal to the treating physician, extends the doctrine into realms well beyond its original boundaries. Nor are limitations easily definable. Are patients to be informed of every fact which might conceivably affect performance in the surgical suite? Moreover, here, no clear nexus has even been established between injury and lack of knowledge.

Id. at 341. Expansion of the informed consent doctrine, as sought by Appellants here and in Kaski, is neither practical, feasible, nor contemplated by the doctrine of informed consent.

Furthermore, most courts around the country hold that disclosure of a physician's medical or behavioral issues is not required, even where those issues may arguably increase the medical risk to the patient. See e.g. Mau v. Wisconsin Patients Compensation Fund, 266 Wis.2d 1059, 668 N.W.2d 562 (Ct. App. 2003) (denying an informed consent claim where a doctor with a history of substance abuse was not operating under the influence at the time of the operation); 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 the correct analysis of how other jurisdictions have resolved the competing interests of the disclosure of sufficient information for a patient to make an informed choice to receive care versus the privacy right of the physician. These cases also effectively highlight the pandora's box such a standard could open and the difficulty created for effectively managing such a standard. As such, the trial court correctly declined to expand the informed consent doctrine in the manner sought by the Appellants in this case.

C. Existing law sufficiently balances the privacy rights of physicians as to their own personal, medical or behavioral issues with a physician's duty to disclose under the existing doctrine of "informed consent".

The South Carolina public is already protected in many ways from truly impaired physicians. First and foremost, the most obvious remedy is a medical malpractice action which both provides compensation to victims and allows for punitive damages to punish offending physicians. Physicians also are subject to criminal penalties:

> A person licensed or otherwise authorized by the Board of Medical Examiners who attends a patient while under the influence of alcohol or drugs is guilty of a misdemeanor and, upon conviction, may be fined not more than ten thousand dollars or imprisoned not more than one year. In addition, upon conviction, the license or authorization granted to the person must be suspended and the person must be disqualified from practicing in this State until he satisfies the board that he is qualified to resume practice. The provisions of this section are in addition to the remedies otherwise relating to physicians who may be addicted to the use of alcohol or drugs.

SC Code § 40-47-112 (2012), emphasis added. Furthermore, licensing boards such as the South Carolina Department of Labor, Licensing and Regulation's Board of Medical Examiner are tasked with policing licensed physicians as described below:

> The primary mission of the South Carolina Board of Medical Examiners is to protect the public and fulfill two major functions: (1) licensing physicians (M.D. and D.O.) … and (2) investigating and disciplining licensees found to be engaged in misconduct as defined in the professions' respective practice acts. This includes illegal, unethical or incompetent conduct.

South Carolina Board of Medical Examiners' Mission Statement, https://llr.sc.gov/med/ (last visited Aug. 30, 2023). See also S.C. Code § 40-1-70. By statute, misconduct constituting grounds for disciplinary action includes violation of a "crime involving moral turpitude or drugs"; engaging "in the habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability"; "practice when judgment or physical ability is impaired by alcohol, drugs, or other substance";

and "sustained a physical or mental impairment that renders further practice by the licensee dangerous to the public or that may interfere with the licensee's ability to competently and safely perform the essential functions of practice." S.C. Code § 40-47-110(B)(3),(4),(5)&(8).

Furthermore, the American Medical Association's Code of Medical Ethics on Physician Health and Wellness requires that Physicians "[t]ake appropriate action when their health or wellness is compromised, including: (i) engaging in honest assessment of their ability to continue practicing safely; … (iv)seeking appropriate help as needed, including help in addressing substance abuse. Physicians should not practice if their ability to do so safely is impaired by use of a controlled substance, alcohol, other chemical agent or a health condition." AMA Code of Medical Ethics 9.3.1 Physician Health & Wellness, available at https://code-medical-ethics.ama-assn.org/sites/default/files/2022-08/9.3.1.pdf (last visited Aug. 30, 2023). Expanding the doctrine of informed consent is unnecessary and unreasonably vexatious, especially in light of South Carolina's existing patient protections and remedies.

D. For Appellants to prevail, South Carolina physicians would necessarily lose protections to which they are entitled by federal laws such as the Health Insurance Portability and Accountability Act of 1996 and 42 CFR Part 2.

The AMA and SCMA are also mindful of the fact that physicians are also patients. Choosing to practice medicine does not come with a requirement that providers must abandon their right to maintain their own privacy and dignity. While physicians cannot practice if their ability to do so safely is impaired by substance abuse or a health condition, their entire patient base is not entitled to the details of any possible substance abuse or a health condition treatment under the guise of informed consent. Congress has repeatedly crafted legislation with the consistent purpose and goal of ensuring individuals, including physicians, are not discouraged from seeking care due

to confidentiality concerns. For instance, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") Privacy Rule's legislative intent centers around protecting a patient's privacy interests to ensure that individuals are not discouraged from seeking voluntary treatment. Congress has even further protected privacy interests related to substance use disorder ("SUD") treatment. The regulations at 42 CFR part 2 ("Part 2") additionally protect the confidentiality of SUD treatment records. The purpose of Part 2 is to ensure that patients receiving treatment for a SUD in a Part 2 program ''are not made more vulnerable to investigation or prosecution because of their association with a treatment program than they would be if they had not sought treatment'' 48 FR 38763. Additionally, 42 CFR § 2.20, states that "no State law may authorize or compel any disclosure prohibited by these [Part 2] regulations."

The State of South Carolina's Board of Medical Examiners supports physicians in treatment by maintaining confidentiality through the South Carolina Recovering Professional Program ("RPP"), which "emphasizes confidentiality, education, and opportunity while treating the professional with dignity throughout the process of recovery" via its Pledge of Privacy. https://scrpp.org (last visited Aug. 30, 2023). Whether it be intentional or an unintended consequence, Appellants appear to seek to have this Court rule that physicians are required to waive any rights they may have under HIPAA, Part 2, and any other privacy laws. This requirement would negatively impact South Carolina's ability to attract and retain physicians in the state and discourage physicians from seeking voluntary treatment, leading to disastrous results to the public.

CONCLUSION

For the reasons stated herein, as well as those in Respondents' filed briefs, the trial court correctly held that Appellants cannot maintain a cause of action for lack of informed consent arising out of the Respondents' alleged failure to inform her of Dr. Davidson's substance abuse issues because South Carolina law does not recognize a duty on physicians to disclose their personal, medical, or behavioral issues. Accordingly, this Court should affirm the trial court's decision and decline to expand the existing doctrine of informed consent in South Carolina.

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