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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

Appellate Case No. 2021-001129

Anita and James Chabek, …………….. Appellants,

v.

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

PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Appellants Anita and James Chabek petition the Court for rehearing and reconsideration of Opinion No. 6039 filed December 13, 2023. Chabek v. AnMed Health, Op. No. 6039 (S.C. Ct. App. Dec. 13, 2023) (Howard Adv. Sh. No. 48 at 74). The Chabeks specifically ask the Court to reconsider Section II of its opinion affirming the dismissal of Ms. Chabek's claim for lack of informed consent.

BACKGROUND

In late summer 2017, Appellant Anita Chabek began treating with Respondent Larry Davidson, MD at AnMed Health Spine and Neurosurgery (a medical practice operated by Respondent AnMed Health) for lower back pain radiating down her right leg. (R. p. 83). During an August 10, 2017 consultation, Dr. Davidson recommended surgery to resect a right-sided L5/S1 synovial cyst. Id. Dr. Davidson informed Ms. Chabek of some of the risks the surgery posed including infection, wound healing difficulties, hemorrhage, spinal destabilization, paralysis, nerve injury, and the exacerbation of her current symptoms. Id. Dr. Davidson did not, however, inform Ms. Chabek that he was in the midst of an alcoholism relapse. As it turns out, Dr. Davidson had begun drinking again nearly a year-and-a-half before Ms. Chabek's surgery. (R. p. 88 ¶ 6). By fall 2017, Dr. Davidson was drinking almost daily and could not stop. (R. p. 88 ¶¶ 7, 8).

By December, Dr. Davidson had been arrested for driving under the influence, and he entered inpatient rehabilitation treatment a month later. (R. p. 88 ¶ 11). As the details of Dr. Davidson's alcoholism have come to light, he has provided false or misleading sworn testimony on the matter. (R. p. 78, lines 9-21). Deprived of this crucial information, Ms. Chabek allowed Dr. Davidson to perform her spinal surgery at AnMed Health on August 27, 2017. Had Dr. Davidson disclosed his substance abuse problem, Ms. Chabek would have insisted on a different surgeon. (R. p. 89 ¶ 14). Ms. Chabek also alleged Dr. Davidson made multiple errors during the procedure.

On March 12, 2021, Ms. Chabek and her husband Appellant James Chabek filed a Notice of Intent to File Suit ("NOI") against Dr. Davidson and AnMed Health (collectively, "Respondents"). The filing included a "Statement of Facts" stating the Chabeks' intent to assert claims against Respondents for medical negligence, lack of informed consent, negligent supervision, and general negligence. (R. pp. 29- 35 ¶¶ 25-48). Approximately one month later, the Chabeks submitted expert affidavits alleging Dr. Davidson deviated from the standard of care in his performance of Ms. Chabek's surgery. (R. p. 85 ¶ 4). The experts also opined that a reasonable physician in Dr. Davidson's position would have disclosed his substance abuse relapse prior to the surgery. (R. p. 168 ¶ 3).

Respondents filed motions to dismiss. (R. pp. 98-99). Both motions argued none of Appellants' claims were filed within the time period allowed by the applicable statute of limitations. The Honorable R. Lawton McIntosh heard oral arguments on July 21, 2021. On September 15, 2021, the circuit court entered a Form 4 order granting Respondents summary judgment based on the statute of limitations. The circuit court's formal order granting summary judgment was entered on November 17, 2021. In that order, the circuit court ruled (1) Ms. Chabek's medical negligence claim was untimely because it accrued at the latest in "early March" 2018; (2) Ms. Chabek's informed consent claim failed as a matter of law because Dr. Davidson had no legal duty to disclose his active alcoholism relapse before performing spinal surgery on Ms. Chabek; and (3) Mr. Chabek's claim for loss of household services was untimely. (R. pp. 16-22). Appellants filed and served a timely notice of appeal.

This Court heard oral arguments on September 14, 2023, and issued its ruling on December 13, 2023. Chabek v. AnMed Health, Op. No. 6039 (S.C. Ct. App. Dec. 13, 2023) (Howard Adv. Sh. No. 48 at 74). The Court reversed the circuit court's dismissal of Ms. Chabek's medical

negligence and negligent supervision claims but affirmed the dismissal of Ms. Chabek's informed consent claim.

ARGUMENT

1. The "boundaries" the Court imposed on South Carolina's informed consent doctrine are not supported by South Carolina precedent or persuasive authority considering similar principles.

The Court correctly recognized South Carolina's informed consent doctrine to be "broad and flexible" while also recognizing precedent has imposed "boundaries" on the scope of a physician's duty to disclose. Chabek, Op. No. 6039, at 86. However, the boundaries the Court applied are not supported by South Carolina law.

First, the Court reasoned that, since a physician's duty to disclose relates to "material risks involved in the procedure," South Carolina's informed consent doctrine is "procedure-specific." Id. (citing Hook v. Rothstein, 281 S.C. 541, 547, 316 S.E.2d 690, 694-95 (Ct. App. 1984)). Second, the Court appeared to use the same Hook language to conclude "the risk must be involved in the procedure *itself*." Chabek, Op. No. 6039, at 86 (emphasis in original). The Court then reasoned no "personal life factor" of the physician performing the procedure could fall within the disclosure duty because those factors are not "inherent to the procedure." Id. Limiting the informed consent doctrine to "procedure-specific" risks is not consistent with South Carolina Supreme Court precedent. Nearly 20 years after Hook, the Supreme Court recognized a viable informed consent claim for an undisclosed risk that was neither specific to nor inherent in a patient's brain surgery. Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002).

The patient in Harvey underwent a carotid endarterectomy at Lexington Medical Center as well as additional surgical interventions when complications arose from the original procedure. Id. at 306-07, 566 S.E.2d at 531. The dispute centered on communications between physician and

patient regarding the patient's religion-based aversion to the use of blood products during any medical procedure. Id. While the physician did not transfuse his patient with blood during the endarterectomy, two units of packed red blood cells were used in the follow-up procedure. Id. at 307, 566 S.E.2d at 532. Following the patient's recovery, the physician faced an informed consent-based claim related to risks created by the patient's personal aversion to blood transfusions. At trial, the circuit court directed a verdict to the physician on this claim, but the Supreme Court reversed. Id. at 312-13, 566 S.E.2d at 534. In other words, Harvey found a viable informed consent claim related to a risk of exsanguination (i.e. severe blood loss) that arose not from the procedure itself, but from the patient's conscience-based religious preference. Thus, procedure-specificity and the degree to which a risk "inheres" to the procedure are not appropriate boundaries on South Carolina's informed consent doctrine.

Moreover, unlinking a physician's duty to disclose from the material context in which the procedure was performed is to overlook the core purpose of the informed consent doctrine. No boundary on the doctrine should be imposed that intrudes on "the patient's right to exercise control over his or her own body by deciding for himself or herself whether or not to submit to the particular procedure." Hook, 281 S.C. at 547-48, 316 S.E.2d at 695. The Court's procedure-specificity boundary fails to advance or respect a patient's right of control over the decision whether to move forward with a proposed course of medical care. That boundary suggests denying Ms. Chabek information on the risk of post-operative bleeding from a proposed cyst resection surgery would invade her right to decide whether to submit to the procedure but denying her information on the surgeon's active, uncontrolled alcohol abuse would not. The latter scenario impedes Ms. Chabek's right to control her medical destiny as much (if not more) than the former one.

The boundaries the Court chooses also fail to account for other important language from precedent. The Court imposes the procedure-specificity and inherence boundaries despite acknowledging a physician's duty to disclose extends broadly to "the dangers associated with medical treatment" including all "attendant risks and effects." Chabek, Op. No. 6039, at 84-85 (quoting Hardee v. Bio-Medical Applications of S.C., Inc., 370 S.C. 511, 516, 636 S.E.2d 629, 631-32 (2006)). Hardee's decision to extend the disclosure duty to "attendant risks and effects" is inconsistent with the Court's procedure-specificity boundary. A New Jersey court interpreted similar language in Behringer v. Med. Ctr. at Princeton, 592 A.2d 1251 (N.J. Super. 1991). New Jersey common law extended a physician's duty to disclose to both "the nature of the treatment" and "any attendant substantial risks." Behringer held this language was broad enough to require a surgeon to tell potential patients that he was HIV-positive before operating on them. Id. at 1255. In fact, this language was the specific reason why the court rejected the surgeon's argument that his physical ailment was beyond the reach of an informed consent claim. Id. at 1281 (noting argument that duty to disclose did not include "surgeon's physical condition" but citing "attendant substantial risk" language to find "informed consent cases are not so narrow").

In sum, while the Court focuses on language from its precedent (Hook) to find South Carolina's informed consent claim is procedure-specific and limited to risks inherent to the procedure, those boundaries conflict with the South Carolina Supreme Court's broader conceptions of the doctrine (Harvey, Hardee). Accordingly, the Court should reconsider its ruling and reverse the circuit court's dismissal of Ms. Chabek's informed consent claim which is viable under South Carolina law at this early stage in this litigation.

2. **Ms. Chabek's claim falls within the recognized boundary for South Carolina's informed consent doctrine.**

The Court's finding that South Carolina's informed consent doctrine must have a boundary addresses an important concern. An informed consent claim is not a vehicle for redress for any patient who has "buyer's remorse" after surgery. Ms. Chabek's opposition to the Court's choice to impose procedure-specificity as a boundary is not to suggest the informed consent doctrine is boundless. Instead, the Court should reconsider its ruling to apply the boundary for informed consent claims consistently recognized in South Carolina precedent—materiality of the risk. Hook, 281 S.C. at 547, 316 S.E.2d at 695; Fletcher v. Med. Univ. of S.C., 390 S.C. 458, 465, 702 S.E.2d 372, 375 (Ct. App. 2010) (citing Hook); Melton v. Medtronic, Inc., 389 S.C. 641, 656, 698 S.E.2d 886, 894 (Ct. App. 2010) (citing Hook).

Materiality is a substantial boundary against overexpansion of the informed consent doctrine. A plaintiff must come forward with expert testimony to show a reasonable physician would have discussed the undisclosed risk before proceeding to surgery. Hook, 281 S.C. at 553, 316 S.E.2d at 698. This is a far more manageable boundary than forcing courts and litigants to wrestle with whether a specific danger is "inherent" to the patient's surgery.[1] Focusing on materiality as determined by expert testimony syncs the informed consent doctrine with all other forms of medical malpractice claims. Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014) (holding that expert testimony is used to define a medical

[1] Determining what is "inherent" to surgery is not as simple as one might suspect. Hook is not clear in what sense the term is deployed. This Court seemed to take the term from a jury charge the circuit court issued at trial. Hook, 281 S.C. at 562 n. 5, 316 S.E.2d at 703 n. 5. The source of that charge is unclear. It is also far from clear that "inherent" has any substantive meaning beyond "material." Id. (charging jurors that a physician has a duty to disclose "dangers inherent in the treatment" but later charging jurors the duty extends to "risks which are material to the proposed procedure").

provider's standard of care and alleged breach of the standard). At this early stage in proceedings, Ms. Chabek showed Dr. Davidson's current, uncontrolled alcoholism was a material risk through an affidavit from a qualified expert who stated that a reasonable surgeon would have disclosed this information. (R. p. 168 ¶¶ 2-3, 6). This expert opinion was sufficient to show a viable claim for lack of informed consent.

3. The Court's limitations on the scope of the informed consent doctrine are unnecessarily broad to decide this case.

Alternatively, the Court should reconsider its ruling to address its sweeping and unnecessarily broad scope. Affirming the circuit court's dismissal of a narrow claim based on Dr. Davidson's alcohol struggles did not require the Court to issue a broad pronouncement on the broad, novel issue of informed consent and all physician "personal life factors."

The Court misapprehended the scope of the issue on appeal. The Court asserts that Ms. Chabek would have the Court "require disclosure of the treating physician's personal, medical, and behavioral issues." Chabek, Op. No. 6039, at 84. However, Ms. Chabek never stated the issue in such broad terms. The second issue on appeal addressed only whether Dr. Davidson had a "duty to disclose his active alcohol abuse relapse to obtain informed consent." (App. Br. at viii); see also Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal"). Ms. Chabek asked only that the Court find "a surgeon's active alcohol struggles are a material risk" that supported an informed consent claim because her expert opined that a reasonable surgeon would have disclosed it. (App. Br. at 24). The issue before the Court was always narrowly tailored to Dr. Davidson's alcohol issue and Ms. Chabek's 2017 back surgery.

Yet, the Court held "our state's informed consent doctrine does not require a physician to disclose personal life factors." Chabek, Op. No. 6039, at 86. "Personal life factors" is never defined

but, if meant as a description of the "personal, medical, and behavioral issues" the Court referenced earlier, then it is a ruling of remarkable breadth. A surgeon would have no legal duty to disclose his degenerative vision problem or persistent hand tremors that drastically increase the risk of surgical error. That same surgeon could leave out from his pre-operative consultation that the surgeon planned to allow a second-year resident take over mid-surgery. There can be no informed consent claim even if every respected practitioner would have made these disclosures and even if every reasonable patient would be mortified to learn of these risks after unwittingly assuming them. The effect of the Court's ruling as currently constructed far exceeds the narrowly defined issue before it and eliminates whole categories of potential legal claims without full briefing or argument to examine those implications.

Even if the Court chooses not to alter its substantive ruling, there are a host of legal and prudential considerations that call for narrowing its holding. This Court has recently reaffirmed the principle that "[a]n appellate court should decide cases on the narrowest possible ground." State v. Adams, 430 S.C. 420, 430, 845 S.E.2d 217, 220 (Ct. App. 2020). Often, the "most important thing" an appellate court decides is "not to decide" more than the case before it requires. Id. Narrow rulings fit with the Court of Appeals' function as an "error-correcting court" that leaves "law-giving" to the South Carolina Supreme Court. Jean Hoefer Toal et al., Appellate Practice in South Carolina 21 (3d ed. 2016). Here, the Court acknowledges an informed consent claim for a surgeon's alcoholism relapse presents a novel issue. Chabek, Op. No. 6039, at 86. Accordingly, the Court's ruling should have been limited to that issue rather than speaking in broader terms on other types of risks to patient safety. That is especially true, when in an effort to craft a broader holding based on "procedure-specificity," the Court failed to account for the Supreme Court's contrary ruling in Harvey.

Plus, the consideration of novel questions like the ones presented in this case should be based on considerations of what outcome "best comport[s] with the law and public policies" of the state along with "the Court's sense of law, justice, and right." Mims Amusement Co. v. S.C. Law Enforcement Div., 366 S.C. 141, 145, 621 S.E.2d 344, 346 (2005). The Court's broad ruling on the scope of South Carolina's informed consent doctrine did not conduct this broader policy inquiry but instead relied mainly on statements from Hook, a forty-year old opinion that considered only an undisclosed risk of allergic reactions during a diagnostic procedure. An overly broad ruling is especially imprudent given that while, as the Court acknowledges, some jurisdictions agree with Respondents' position, multiple jurisdictions have also adopted Ms. Chabek's position. (App. Br. at 18-19) (collecting cases).

A broader look at policy considerations calls the Court's conclusion into question. Hook chose the "professional standard" for determining the scope of South Carolina's informed consent doctrine which means what a defendant physician must disclose is what a reasonable physician would disclose. 281 S.C. at 553, 316 S.E.2d at 698. As judged by professional standards, a reasonable physician must disclose far more than the "procedure-specific" risks the Court's holding contemplates. Any physician seeking to adhere to American Medical Association standards would know he/she must tell the patient if there are plans to make substitutions to the patient's surgical team. (App. Br. in Opp. to SCHA Amicus Br. at 5) (citing Am. Med. Ass'n Code of Medical Ethics § 2.1.6, "Substitution of Surgeon" (2016) ("A surgeon who allows a substitute to conduct a medical procedure on his or her patient without the patient's knowledge or consent risks compromising the trust-based relationship of patient and physician"). That same physician would know his/her disclosure duty extends beyond procedure-specific risks to include "all significant aspects" of the surgical team including the "*qualifications of clinicians* . . ." (App. Br.

in Opp. to SCHA Amicus Br. at 5-6) (citing Am. Med. Ass'n Code of Medical Ethics § 2.3.6, "Surgical Co-Management" (2016) (emphasis added)). These policy considerations deserve a full airing in an appropriate factual context before South Carolina's appellate courts impose a categorical rule on the scope of the state's informed consent doctrine.

In sum, as an alternative basis for relief, the Chabeks respectfully request the Court reconsider its ruling to limit its scope to the matter of Dr. Davidson's alcoholism relapse and remove any statements that impose broader limitations on the scope of potential informed consent claims.

CONCLUSION

For the reasons stated above, the Chabeks respectfully request the Court grant this Petition for Rehearing.

Respectfully submitted,

/s/ Jordan C. Calloway

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on December 28, 2023, he served Respondents' counsel with Appellants' Petition for Rehearing at the email addresses listed below pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina's Supreme Court's August 25, 2021 order (Order No. 2021-08-25-02):

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1 attachments (122 KB)

A. Chabek--Pet. for Rehearing FINAL PDF.pdf;

Counsel:

I am attaching Appellants' Petition for Rehearing that is being electronically filed today with the Court of Appeals. Pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina Supreme Court's August 25, 2021, order (Order No. 2021-08-25-02), please consider this email as service for the petition.

Thanks,

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