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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.

APPELLANTS' BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the circuit court erred in ruling as a matter of law at the Notice of Intent stage that Ms. Chabek's medical negligence claim was untimely when her injuries were not apparent following surgery and Dr. Davidson assured Ms. Chabek her post-operative complications were normal.

2. Whether the circuit court erred in ruling as a matter of law that Dr. Davidson had no duty to disclose his active alcohol abuse relapse to obtain informed consent for Ms. Chabek's surgery when an expert concluded a reasonable physician would make that disclosure.

3. Whether the circuit court erred in dismissing Ms. Chabek's claim against AnMed for negligent supervision when she did not learn of the facts giving rise to the claim until October 2020.

STATEMENT OF THE CASE

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). Dr. Davidson made multiple errors during the procedure. He removed an excessive portion of Ms. Chabek's right L5-S1 facet joint and failed to install instrumentation and to perform fusion to properly support the spine. (R. p. 85 ¶ 4). The errors were not the type Ms. Chabek could observe or perceive in the days and months after surgery. She made several post-operative visits for examinations by Dr. Davidson or physician assistant William Jeffcoat where she complained of

pain. (R. p. 131-33, 135, 139, 142-43). However, they told her she was experiencing "expected postoperative changes" and "it could take some time for this . . . pain to improve." (R. p. 136, 142). A January 2018 MRI was read to be "[e]ssentially normal" with its only findings described as "nonspecific." An office note from a March 6, 2018 visit with Jeffcoat notes a recurrent synovial cyst that was "unlikely . . . symptomatic" and that there was no indication of instability on Ms. Chabek's films. (R. p. 148).

Since Jeffcoat had decreased the dosage of the medication Ms. Chabek needed to relieve her persistent pain, she decided to seek a second opinion from Advanced Spine and Neurosurgical Associates in Greenwood, South Carolina ("Advanced Spine"). (R. p. 84). Ms. Chabek underwent additional scans and then met with Advanced Spine physician Dr. Gregory McLoughlin on August 2, 2018, to discuss the results. During this visit, Dr. McLoughlin reviewed the scans with Ms. Chabek and explained that the "imaging does demonstrate and confirm the right fractured L5 facet joint" and "[a]n instability at this level . . . could correlated with her right leg pain." Id. Ms. Chabek argues this was the moment when she was first put on notice that her continued problems could be related to errors during Dr. Davidson's August 2017 surgery. (R. p. 66, line 25 – p. 68, line 4).

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. The filing included a "Statement of Facts" stating Appellants' 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, Appellants submitted expert affidavits alleging Dr. Davidson deviated from the standard of care in his performance of Ms. Chabek's surgery. (R. p. 85 ¶ 4). Appellants' 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). As for

AnMed Health, an expert concluded the entity unreasonably failed to monitor Dr. Davidson's conduct in its facility in light of his alcohol struggles. (R. pp. 165-66 ¶¶ 4-6).

As part of their initial responses to the NOI, 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. Id. On June 8, 2021, Appellants filed an Amended Statement of Facts with additional detail on Ms. Chabek's post-surgery care. During post-operative visits, Dr. Davidson and other AnMed Health providers told Ms. Chabek that "the complications she was experiencing were known risks that can occur with her surgery and were not the result of any inappropriate treatment of medical negligence." (R. p. 91 ¶ 20). Ms. Chabek trusted those representations and, as a result, "had no reason to suspect that there was a possibility that her complications were due to medical malpractice." (R. p. 91 ¶ 21). The situation only changed when she received a report on the new imaging from Advanced Spine in August 2018. (R. p. 91 ¶ 22-23).

Respondents then filed a joint memorandum in support of their motion, which they had re-captioned as a "Motion to Dismiss and in the alternative, Motion for Summary Judgment." (R. p. 100). Respondents attached to their memorandum 37 pages of exhibits including just over twenty pages from Ms. Chabek's voluminous medical record. (R. pp. 113-49). Appellants filed their memorandum opposing the motion on July 8, 2021, and the Honorable R. Lawton McIntosh heard oral arguments on July 21, 2021.[1] During the hearing, Appellants' counsel introduced three

[1] While the motion was pending, the parties completed the statutorily-required pre-suit mediation process. (R. pp. 172-74). Appellants then filed a Summons and Complaint on August 2, 2021, asserting the same four claims referenced in the Amended Statement of Facts as well as a loss of consortium claim by Mr. Chabek. (R. pp. 51-52 ¶¶ 49-52). AnMed Health answered, and later filed a motion to dismiss based on the statute of limitations. (R. p. 164). Dr. Davidson moved to dismiss on August 27, 2021. (R. pp. 162-63). This action is listed as pending in the Anderson County Court of Common Pleas.

exhibits. (R. pp. 83-86). On September 15, 2021, the circuit court entered a Form 4 order granting Respondents summary judgment based on the statute of limitations and stated that a formal order would be filed at a later date. (R. pp. 1-3). Appellants filed a timely Rule 59(e), SCRCP motion on September 27, 2021, which the circuit court denied without a hearing in a Form 4 order the same day. (R. pp. 155-61; R. pp. 4-6).

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) the post-operative assurances Ms. Chabek claimed she received from Dr. Davidson and AnMed Health providers held no weight because they were "solely a self-serving attempt to circumvent [Appellants'] claims being barred by the statute of limitations"; (3) 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; (4) Appellants may not argue for application of the "continuous treatment rule"; and (5) Mr. Chabek's claim for loss of household services was untimely. (R. pp. 16-22). Appellants filed and served a timely notice of appeal.

STANDARD OF REVIEW

When reviewing a 12(b)(6) motion, a court must view a complaint in the light most favorable to the plaintiff and every doubt must be resolved in the plaintiff's favor. Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). If the "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case," then the court may not grant a 12(b)(6) motion. Sloan Constr. Co. v. Southco Grassing Co., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). A court may not dismiss a complaint merely because the court doubts the plaintiff will prevail. Plyler, 373 S.C. at 645, 647 S.E.2d at 192. An appellate court must

apply the same standard. Dawkins v. Union Hosp. Dist., 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014).

To grant a motion for summary judgment, the circuit court must find that "there is no genuine issue as to any material fact." Rule 56(c), SCRCP. The judge is not to weigh the evidence but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). For claims where the preponderance of evidence burden applies, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). An appellate court "applies the same standard used by the [circuit] court" when reviewing a summary judgment order. Epstein v. Coastal Timber Co., 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

ARGUMENT

Ms. Chabek underwent an intricate spinal surgery in Respondents' operating room on August 22, 2017, and suffered substantial postoperative pain, discomfort, and other complications. As the painful months after surgery dragged on, it was not evident to Ms. Chabek that her continued symptoms were anything more than typical postop problems or that her seemingly negative outcome was anything other than an unfortunate complication that can happen even with a competently-performed procedure. Dr. Davidson expressly assured Ms. Chabek the surgery had

gone well, and other AnMed providers told her nothing was amiss. (R. p. 65, lines 6-8; R. p. 91 ¶¶ 20-21). It was only when Ms. Chabek obtained a second opinion on August 2, 2018, that she learned of instability and a fracture of her L5 facet joint that could indicate she suffered a legal injury rather than just typical postoperative complications. (R. p. 84). With her claim accruing on this date, Ms. Chabek timely asserted her medical negligence cause of action by filing a NOI on March 12, 2021, well within the three-year statute of limitations.

Thus, the circuit court erred in ruling Ms. Chabek's malpractice claim untimely. The circuit court acted too quickly by resolving a genuine factual dispute over the claim accrual date that belonged to the jury. Respondents asked the circuit court to declare Ms. Chabek's claim untimely before her legal action was even initiated. S.C. Code Ann. § 15-79-125(E) (stating that a civil action for medical malpractice may be initiated only after NOI and pre-suit mediation process are completed). Respondents sought summary judgment on a non-yet-filed legal claim, cited medical records perceived to be favorable to their argument, and asked the circuit court to end Ms. Chabek's claim before she could obtain a single document from Respondents in discovery or ask Respondents' witness a single deposition question.

The timing is especially problematic since South Carolina courts have consistently held accrual dates and the discovery rule implicate factual questions that, when genuinely disputed, only a factfinder can resolve. Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993). As discussed below, the facts concerning the accrual date here are disputed, and Respondents' motion should have been denied or at least delayed until the disputed issue was explored in discovery. Moreover, as the circuit court appeared to recognize at the hearing (R. p. 73, line 13 – p. 74, line 16), there should be no doubt that Ms. Chabek's informed consent and negligent supervision

claims were both timely because they could not accrue until she learned of the danger Dr. Davidson failed to disclose (i.e. his alcoholism relapse) just last year.

1. **The circuit court erred in granting summary judgment on Ms. Chabek's medical negligence claim.**

Ms. Chabek's medical negligence claim is subject to a three-year statute of limitations. S.C. Code Ann. § 15-3-545(A). The start of that limitations period is measured from either (1) the date of the treatment, omission, or operation giving rise to the claim; or (2) the "date of discovery or when it reasonably ought to have been discovered." Id. Ms. Chabek's claim is timely under the discovery rule. Pursuant to this rule, the plaintiff must "discover" her "cause of action" for the claim to accrue. Id. The duty to "discover" requires a plaintiff to act with "some promptness." Young v. S.C. Dep't of Corrections, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999) (citing Dean v. Ruscon Corp., 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996)). But, the duty to act only arises when the information at the plaintiff's disposal is sufficient to implicate a "cause of action" recognized by South Carolina law. S.C. Code Ann. § 15-3-545(A). Since the discovery rule applies an objective standard, a plaintiff is not charged with an attorney-esque ability to unearth legal claims or doctor-level aptitude for understanding medical causality. Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) (noting the objective standard). Instead, a claim accrues only if an objectively reasonable layman in the plaintiff's shoes could have discovered her cause of action. Strong v. Univ. of S.C. Sch. of Med., 316 S.C. 189, 191-92, 447 S.E.2d 850, 852 (1994).

Discovering a cause of action is easier in some contexts than others. South Carolina courts "allow[] some latitude for discovery of an injury in the medical malpractice context" because ascertaining the existence and source of medical injury often requires expert knowledge. McClain v. Jarrard, 354 S.C. 218, 220, 580 S.E.2d 763, 764 (Ct. App. 2003). In sum, a medical negligence

claim accrues only when the plaintiff has available to her all the information required so that an objectively reasonable person in her position, acting with reasonable diligence, would know that a malpractice claim against her physician may exist. Young, 333 S.C. at 719, 511 S.E.2d at 416 (citing Dean, 321 S.C. at 364, 468 S.E.2d at 647).

a. The accrual date the circuit court selected is not supported by the limited medical records Respondents submitted.

The key question for Respondents' motions was when an objectively reasonable person in Ms. Chabek's position would be on notice of a potential malpractice claim against Respondents arising from Dr. Davidson's alleged errors during the August 2017 spinal surgery. Those alleged errors included (1) removal of an excessive portion of Ms. Chabek's right L5-S1 facet joint; and (2) failure to install instrumentation and to perform fusion to properly support the spine. (R. p. 85 ¶ 4). Since Appellants filed a NOI on March 12, 2021, their claims are timely if they accrued on or after March 12, 2018. The circuit court did not specify an accrual date, holding only that the latest date the limitations period for Ms. Chabek's medical negligence claim could have begun was "in early March 2018." (R. p. 16). The circuit court reached this conclusion based on a flawed analysis of the medical records and an incomplete view of the facts.

The circuit court first cited medical records documenting Ms. Chabek's reports of pain and discomfort during a series of post-operative appointments beginning six days after surgery (R. pp. 8-11, 14-15; R. pp. 131, 133, 135, 139, 142, 143). However, the mere fact that a surgical patient suffers postoperative pain does not mean she knows or has reason to know the surgeon or hospital is subject to a malpractice claim. Knox v. Greenville Hosp. Sys., 362 S.C. 566, 571, 608 S.E.2d 459, 462 (Ct. App. 2005) ("The mere presence of pain or discomfort, to be sure, will ordinarily not serve to trigger the commencement of the applicable statute of limitations"). Similarly, the circuit court referenced post-operative visits where Ms. Chabek disagreed with AnMed providers

over the management of her pain medication. (R. pp. 10-11, 16; R. pp. 144-45). When Ms. Chabek questioned the quality of PA Jeffcoat's care, her question arose solely from the pain medication management issue, not anything that would implicate Dr. Davidson's performance during the surgery. (R. p. 144) (documenting Ms. Chabek's question as to whether Jeffcoat "knew what he was doing since he wrote the script"). It was this continuing dispute that was largely responsible for Ms. Chabek's choice to seek care elsewhere. (R. p. 149). As such, the circuit court erred in concluding Ms. Chabek's complaints of post-surgical pain meant she was on notice of a surgery-related malpractice claim.

The circuit court then relied on the report of a nerve conduction study performed by Dr. Paul Brill on March 1, 2018. Far from placing Ms. Chabek on notice of possible negligence during the August 2018 surgery, the report concluded the study was "[e]ssentially normal." (R. p. 147). The circuit court focused on the report's reference to "mild isolated" activity noted in the muscles adjacent to the scar on Ms. Chabek's back. (R. p. 16). But, the report went on to call this isolated activity a "nonspecific finding," and there is no indication the specific contents of this report were ever shared with Ms. Chabek. (R. p. 65, lines 16-23).

Finally, the circuit court relied on the note for Ms. Chabek's office visit with Jeffcoat on March 6, 2018, which the court construed as evidence showing Ms. Chabek's continued problems could be the product of malpractice. (R. pp. 11, 16; R. p. 148). However, the note's text does not support that conclusion. While Jeffcoat told Ms. Chabek tests results pointed to the development of a synovial cyst, he concluded the cyst was "unlikely . . . symptomatic." (R. p. 148). Moreover, while there is some reference to possible instability in Ms. Chabek's lumbar spine, the very next line notes "this is not identified on . . . films." Id. Finally, while Jeffcoat at one point writes about

the possibility of CT myelography, he ultimately opts to refer Ms. Chabek to physical therapy and delays the decision on the CT for two to three weeks. Id.

Following this visit with Jeffcoat, Ms. Chabek promptly sought a second opinion and began treating with Advanced Spine. (R. p. 84). After a round of diagnostic tests to evaluate her condition, Ms. Chabek had a follow-up appointment with Dr. Gregory McLoughlin on August 2, 2018. Id. This was the moment when Ms. Chabek was first put on notice that her continued problems could be related to errors in Dr. Davidson's August 2017 surgery. During this visit, Dr. McLoughlin reviewed the scans with Ms. Chabek and explained that the "imaging does demonstrate and confirm the right fractured L5 facet joint" and "[a]n instability at this level . . . could correlate with her right leg pain." Id. Thus, if the circuit court was going to settle on an accrual date as a matter of law on such a limited record and at such an earlier procedural stage, August 2, 2018 was the date where a reasonable person in Ms. Chabek's position would be on notice of her medical malpractice cause of action.

b. The circuit court's premature summary judgment order overlooked other key legal principles governing claim accrual.

In addition to misconstruing the limited medical records Respondents submitted with their motion, the circuit court also failed to apply key legal principles that must be considered when applying the discovery rule to a medical negligence cause of action.

First, South Carolina's objective test for the discovery rule means that determining when a claim accrued is a question of fact for the factfinder when key facts are disputed. Arant v. Kressler, 327 S.C. 225, 489 S.E.2d 206 (1997) (citing Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962) ("Where these is conflicting testimony regarding the time of discovery, it becomes an issue for the jury to decide"); Johnston, 313 S.C. at 64, 437 S.E.2d at 47 ("Whether a claimant knew or should have known that they had a cause of action is question for the jury"). Based on even the limited

medical records in the current record, a reasonable juror could find a person in Ms. Chabek's position was first provided sufficient notice of her malpractice claim when she received a second opinion in August 2018 that first linked the instability of her L5 joint with her right leg pain rather than the ambiguous, inconsistent March 6, 2018 note Respondents tout.

Second, granting summary judgment on a disputed factual question on such a limited record is contrary to established practice. The South Carolina Supreme Court has held that "summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543-44 (1990); see also Gray v. Askew, 423 S.C. 47, 49, 813 S.E.2d 717, 718 (2018) (vacating a summary judgment order because "the record contains minimal evidence" and remanding to allow additional discovery). Here, discovery is not just incomplete, Appellants were not even given the chance to begin discovery. The motions that ultimately resulted in summary judgment were Respondents' very first response to the NOI. (R. pp. 98-99). Thus, Respondents technically sought to dismiss Appellants' claims before they were even initiated. S.C. Code Ann. § 15-79-125(E) (stating that a civil action for medical malpractice may be initiated only after NOI and pre-suit mediation process are completed). Respondents then filed a consolidated memorandum in support of their motions at that point captioned as both a motion to dismiss and motion for summary judgment. (R. p. 100). The change in caption was to facilitate Respondents attaching a curated selection from hundreds of pages in Ms. Chabek's medical record.

While Ms. Chabek was able to cite a few medical records in response, she was left at a decided competitive disadvantage because she had not yet conducted any discovery.[2] She was

[2] In contrast, as required by statute (S.C. Code Ann. § 15-36-100(B); § 15-79-125(A)), Respondents received from Appellants standard interrogatory responses and expert affidavits during the NOI process. (R. pp. 37-39, 165-71).

never able to seek documents from Respondents or to question Dr. Davidson, PA Jeffcoat, and other key witnesses on their communications with Ms. Chabek before or after the August 2017 surgery. By seeking such a quick ruling based on their curated documents, Respondents effectively limited the record in a way that prevented Ms. Chabek from fully supporting her arguments. Pursuant to Baughman, a ruling on summary judgment should be delayed to allow further discovery if Ms. Chabek can show (1) additional discovery will uncover additional relevant evidence; and (2) she has not unreasonably delayed in seeking discovery. 306 S.C. at 112-13, 410 S.E.2d at 544.

Ms. Chabek can make both showings. Even with the limited records Respondents have presented, it is evident that further discovery would be useful. The circuit court order cited a report from Dr. Brill (R. pp. 11-16; R. p. 148) but further discovery would be required to determine whether the report's contents were ever communicated to Ms. Chabek. The circuit court also relied heavily on the March 6, 2018 office note authored by Jeffcoat. (R. pp. 11-16). Yet, as discussed above, its contents are ambiguous in some places, inconsistent at others, and can only be truly understood through the sworn testimony of the participants in that conversation along with any witnesses to it. Moreover, Ms. Chabek argues Respondents affirmatively misled her into believing her post-operative struggles were part of the normal recovery process. (R. p. 65, lines 6-8; R. p. 91 ¶¶ 20-21). Even among the limited records Respondents cite, there is support for Ms. Chabek's claim and indications that further exploration of that issue would be fruitful. (R. p. 136) (stating during Ms. Chabek's Nov. 16, 2017 post-operative visit that "it could take some time for this . . . pain to improve"); (R. p. 142) (noting Ms. Chabek has experienced "expected postoperative changes"). Ms. Chabek also meets the second Baughman requirement. She has not delayed at all in seeking discovery as Respondents moved to dismiss/obtain summary judgment before she had

even filed her complaint. See Rule 30(a)(1), SCRCP (limiting depositions to "[a]fter commencement of an action . . .").

Third, the circuit court failed to recognize what information must be at a patient's disposal to "discover" medical malpractice manifesting as postoperative complications. The mere fact that Ms. Chabek suffered postoperative complications does not put her on notice of potential malpractice during the surgery because, as this Court has held, the occurrence of a complication is not itself evidence of negligence. Fletcher v. Med. Univ. of S.C., 390 S.C. 458, 463, 702 S.E.2d 372, 374 (Ct. App. 2010). As such, the moment when an objectively reasonable patient would "discover" her medical malpractice claim must be measured from when the information available to the patient was sufficient to indicate her post-surgery symptoms were perhaps not an ordinary or expected complication of the procedure. E.g. Stark v. Johnson & Johnson, 10 F. 4th 823, 823 (7th Cir. 2021) ("As a general rule, the failure of a medical procedure or product to cure a patient does not necessarily signal that anyone acted wrongfully, particularly when the patient experiences known complications that do not necessarily result from tortious actions"); Fine v. Checcio, 870 A.2d 850, 861 (Pa. 2005) (finding question of fact on the discovery rule where a patient's face numbness following dental surgery could have been either the product of malpractice or "the typical condition that dental surgery produces"); Gaston v. Parsons, 864 P.2d 1319, 1325 (Or. 1994) ("Plaintiff's [post-surgery] symptoms were not so clearly unrelated to the procedure performed that as a matter of law a reasonable person would believe that the cause was tortious conduct"). So much of the circuit court's order charges Ms. Chabek with knowledge of her claim based on the fact that she suffered post-surgery complications. However, since complications alone

would not support medical malpractice claim, more was required to put Ms. Chabek on notice of her claim.[3]

Finally, the circuit court improperly discounted Ms. Chabek's assertion that Respondents affirmatively led her to believe her complications were normal parts of the post-operative healing process. Ms. Chabek alleged Dr. Davidson and other AnMed providers responded to her postoperative complaints with assurances that she was experiencing "known complications of the surgery" and there was "no reason to suspect that there was a possibility that her complications were due to medical malpractice." (R. p. 65, lines 6-8; R. p. 91 ¶¶ 20-21). These assertions are far from implausible as even the records Respondents cite show Ms. Chabek was told she was experiencing "expected postoperative changes" and "it could take some time for this . . . pain to improve." (R. pp. 136, 142). The circuit court dismissed these assertions in a single sentence as a "solely self-serving attempt to circumvent" a statute of limitations defense. (R. p. 15).

However, post-incident statements by a tortfeasor that hamper a claimant's process for learning the tortious nature of her injury are an important consideration for determining an accrual date. Strong, 316 S.C. at 191-92, 447 S.E.2d at 852 (finding that a defendant's statements concealing the tortious nature of plaintiff's injury will toll the statute of limitations). This rule has been repeatedly applied to surgical errors wittingly or unwittingly concealed by the at-fault

[3] See also Sutherland v. Estate of Ritter, 959 So.2d 1004, 1008-09 (Miss. 2007) ("if the patient has no reason to know that the doctor's negligence in performing the procedure caused the complications, the discovery rule will apply, even though the injury is not latent at all"); Shadrick v. Coker, 963 S.W.2d 726, 734 (Tenn. 1998) (finding medical malpractice claim relating to spinal surgery did not accrue on date patient learned unauthorized surgical screws were used during procedure because defendant physician told patient screw use was "routine treatment" for the surgery); In re Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Prods. Liab. Litig., Docket No. 1:17-md-2775, 2018 WL 6067505, at * 3 (D. Md. Nov. 19, 2018) ("A medical complication . . . does not rise to 'knowledge of an injury' for the purposes of the discovery rule, because it may not in fact be a legally cognizable injury").

surgeon's post-procedure promise that the patient's symptoms were normal. E.g. Otto v. Nat'l Institute of Health, 815 F.2d 985, 989 (4th Cir. 1987) (concluding that post-surgery complications did not put patient on notice of claim because she was "given reasonable and credible explanations for the procedure and for the complications that ensued"); McDonald v. U.S., 843 F.2d 247, 248 (6th Cir. 1988) ("when a physician misinforms the patient that complications are not unusual occurrences and will improve, the statute of limitations is not activated"); Rosales v. U.S., 824 F.2d 799, 804 (9th Cir. 1987) ("Patients may reasonably rely on assurances by physicians that complications are normal and do not indicate that an actual injury has occurred"). A patient should not have to be suspicious of her physician's assertions that postoperative pain is normal and will recede over time. Brazzell v. U.S., 788 F.2d 1352, 1356 (8th Cir. 1986) (since physician advised plaintiff that defendant's conduct could not be the cause of her complication, "it would be unfair to charge [the plaintiff] with reason to know differently"); Harvey v. U.S., Civil Action No. 3:09CV-122-S, 2011 WL 4587450, at * 5 (W.D. Ky. Sept. 30, 2011) (when a patient is told her post-procedure complications are normal, "she is permitted to put faith in her medical treatment").

In sum, the circuit court erred in granting summary judgment and finding Ms. Chabek's medical negligence claim is untimely. The limited medical records in the current record show Ms. Chabek only had the requisite knowledge to "discover" her claim beginning in August 2018. Alternatively, the circuit court erred in ruling on the issue as a matter of law when the facts related to Ms. Chabek's postoperative care are disputed. To properly evaluate the accrual date, Ms. Chabek should be given adequate time to explore the issue in discovery. The circuit court also erred in failing to account for Respondents' post-surgery statements designed to make Ms. Chabek believe her struggles were normal and not the product of malpractice.

2. The circuit court erred in granting summary judgment on Ms. Chabek's informed consent claim.

Ms. Chabek also alleges a credible claim that her August 2017 surgery was performed in the middle of an acute period of Dr. Davidson's years long battle with alcoholism. (R. pp. 88-89 ¶¶ 6-13). Four months after Ms. Chabek's surgery, Dr. Davidson was charged with driving under the influence and then spent time in a residential alcohol treatment facility. (R. p. 88 ¶¶ 11). Dr. Davidson has since provided false or misleading deposition testimony about the timing and severity of his alcohol use in malpractice lawsuits instituted by his patients. (Hearing Tr. 24:9-21). Ms. Chabek's claim is that, in deciding whether to allow Dr. Davidson to operate on her spine, she had a right to know—and Dr. Davidson had a duty to disclose—his active alcoholism. (R. pp. 89-93 ¶¶ 13-14, 29-30). The circuit court erred in ruling as a matter of law that South Carolina law does not recognize Ms. Chabek's claim. (R. pp. 19-20). South Carolina informed consent law requires disclosure of a broad range of risks attendant to a medical procedure, and the scope of a physician's duty to disclose is a matter of medical judgment that a jury must resolve based on the available expert testimony.

South Carolina courts have long recognized a physician's broad duty to warn of "the dangers associated with medical treatment" including all the "attendant risks and affects." Hardee v. Bio-Medical Applications of S.C., Inc., 370 S.C. 511, 516, 636 S.E.2d 629, 631-32 (2006). A patient may pursue a distinct claim based on a physician's failure to obtain informed consent when the physician fails to disclose "material risks" involved in a surgical procedure. Fletcher, 390 S.C. at 465, 702 S.E.2d at 375 (quoting Hook v. Rothstein, 281 S.C. 541, 547, 316 S.E.2d 690, 694-95 (Ct. App. 1984)). Ms. Chabek properly states a lack of informed consent claim by alleging (1) Dr. Davidson failed to disclose his active alcoholism before preforming her August 2017 spinal surgery (R. pp. 89-93 ¶¶ 13, 30); (2) Dr. Davidson's active alcoholism was a material risk Ms.

Chabek should have been permitted to consider before agreeing to surgery (R. p. 93 ¶ 30); and (3) Ms. Chabek would have insisted on a different surgeon had she been informed of Dr. Davidson's condition before the procedure. (R. pp. 89-93 ¶¶ 14, 31). As the circuit court seemed to agree at the hearing (R. p. 74, lines 2-3, 13-16), Ms. Chabek's informed consent claim is timely because, under the discovery rule, the claim only accrued when Ms. Chabek learned of the undisclosed risk. Dr. Davidson's alcoholism only came to light in October 2020. (R. p. 73, lines 19-21; R. p. 74, line 17).

Yet, the circuit court ruled South Carolina law does not recognize Ms. Chabek's claim because the undisclosed risk concerned her surgeon's physical and mental capacity. (R. pp. 19-20). Nothing in South Carolina law requires such a constrained reading of the informed consent cause of action. The circuit court found Hook's reference to the "material risks involved in the procedure" means only risks of the physical procedure itself must be discussed with a patient. (R. p. 17). Textually, that conclusion is flawed because Hook did not limit the duty to risks "of" the procedure but instead extended it to risks "involved in" the surgery. A surgeon whose skills were impaired by the effects of chronic alcoholism was just as much an inherent risk "involved in" the surgery Dr. Davidson undertook as was the chance Ms. Chabek would suffer a blood clot or any other physiological complication.

Plus, a rule that categorically excludes surgeon-related risks from the informed consent tort overlooks crucial principles of South Carolina law. The core purpose of the informed consent requirement is to support patient autonomy. Hook, 281 S.C. at 547-48, 316 S.E.2d at 694-95 (noting "the patient's right to exercise control over his or her own body"). Once a patient receives anesthesia and goes under the knife, her life lies in the surgeon's hands. The informed consent doctrine ensures that patient has a moment before she enters the operating room where she can

"decide intelligently for [herself] whether or not to submit to the particular procedure." Id. (citing Sard v. Hardy, 379 A.2d 1014, 1019 (Md. 1977) and 61 Am. Jur. 2d *Physicians, Surgeons, and Other Healers* § 187, at 318 (1981)). Dr. Davidson's failure to disclose his current alcoholism relapse meant Ms. Chabek could not make a truly informed choice to proceed to surgery. By concealing his alcohol problem, Dr. Davidson denied Ms. Chabek the control over her body that South Carolina law demands.

Protecting patients from physicians suffering from addiction is especially important. The South Carolina Supreme Court agrees that "it is virtually impossible to conceive of a situation which would pose a greater threat to life or serious bodily harm than a physician practicing under the influence of drugs." State Bd. of Med. Examiners v. Fenwick Hall, Inc., 308 S.C. 477, 480, 419 S.E.2d 222, 224 (1992). The danger to a patient in surgery is not just the risk of physiological complications. It is also "imperative that there be no impediments which could cloud a physician's judgment." Id. Fenwick Hall held that even the public had an interest in assuring a doctor was not practicing under the influence of drugs. Id. If the public has an interest in that assurance, then a patient deciding whether to submit to surgery has at least a right to be informed of the risks the surgeon's addiction poses.

The 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. (R. p. 17). However, courts from many other jurisdictions have ruled surgeon-related risks can be "material" information a patient must be given. For example, multiple courts have held that a patient is entitled to know if her surgeon is HIV positive. Faya v. Almaraz, 620 A.2d 327, 333 (Md. 1993); Behringer v. The Medical Center at Princeton, 592 A.2d 1251 (N.J. Super. 1991) (hospital's duty regarding HIV positive surgeon). The Tennessee Court of Appeals

has held that a patient has an informed consent claim based on his surgeon's failure to disclose he was suffering from a debilitating hand ailment at the time of the patient's hip replacement surgery. Hawk v. Chattanooga Ortho. Group, P.C., 45 S.W.3d 24, 33 (Tenn. App. 2000) (finding disclosure of this ailment was included in the surgeon's duty to "supply appropriate information" to enable patient to provide informed consent).[4] Including these risks in a physician's legal duty of disclosure is entirely consistent with the professional expectations the medical community has for its practitioners. See Faya, 620 A.2d at 334 (basing legal duty to disclose HIV status in part on an American Medical Association policy statement advising HIV positive physicians to obtain "the consent of the patient" before proceeding with risky procedures).

Applying these same principles, a Louisiana appellate court held that a surgeon's chronic alcohol abuse is material and must be disclosed to obtain informed consent. Hidding v. Williams, 578 So.2d 1192 (La. App. 1991). Like this case, Hidding arose out of complications from a spinal surgery performed by a physician suffering from alcoholism. Id. at 1194. The patient in Hidding alleged that, during his laminectomy, his surgeon breached the standard of care resulting in permanent bladder and bowel dysfunction. Id. The patient further alleged he only learned after surgery of the surgeon's chronic alcohol abuse. Id. A trial court found the surgeon breached the standard of care in performing the surgery and failed to obtain informed consent by not disclosing his alcoholism. Id. Affirming that ruling, Hidding found the trial court was "entirely correct" to

[4] Similarly, other courts have found that a physician's lack of experience with the procedure and conflict of interests are "material" information that must be disclosed to obtained informed consent. Andersen v. Khanna, 913 N.W.2d 526 (Iowa 2018); Goldberg v. Boone, 912 A.2d 698, 717 (Md. 2006) (citing Dingle v. Belin, 749 A.2d 157, 165-66 (Md. 2000)); Johnson v. Kokemoor, 545 N.W.2d 495, 505 (Wis. 1996); Moore v. Regents of Univ. of Cal., 793 P.2d 479, 483 (Cal. 1990) ("a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment" and failure to do so "may give rise to a cause of action for performing medical procedures without informed consent").

find the surgeon's alcohol issues were a "material risk" to be disclosed before surgery for two main reasons. Id. at 1196. First, as in South Carolina, the court noted the source of the informed consent doctrine is the patient's right to self-determination which means the patient must be provided "sufficient information . . . to make an informed and intelligent decision." Id. at 1194 (citing LaCaze v. Collier, 454 So.2d 1039 (La. 1983); see also Hook, 281 S.C. at 547-48, 316 S.E.2d at 694-95. The surgeon's choice to conceal his alcoholism thwarted that informed decision. Second, Hidding cited the patient's orthopedic surgery expert who testified that a reasonable physician in the surgeon's position would at least disclose his alcoholism to a patient before proceeding to surgery. 578 So.2d at 1197. As discussed in more detail below, Ms. Chabek has presented a similar, uncontroverted expert opinion. (R. p. 168 ¶¶ 2-3) (stating that Dr. Davidson's failed to act as a reasonable neurosurgeon would have when he chose not to disclose his substance abuse relapse before Ms. Chabek's surgery).

In finding Dr. Davidson had no duty to disclose his chronic alcoholism, the circuit court relied first on the Georgia Supreme Court's ruling in Albany Urology Clinic, P.C. v. Cleveland, 528 S.E.2d 777 (Ga. 2000). (Order at 11-12). Albany Urology reversed a lower court ruling and held that a physician was not required to disclose his cocaine abuse to a surgical patient. Id. at 778. However, differences in the claims asserted and the substantive law distinguish Albany Urology from this case. Unlike Ms. Chabek's negligence-based informed consent claim, the Albany Urology plaintiff asserted disclosure violations only as intentional tort claims for fraud and battery. Id.; see also Fletcher, 390 S.C. at 465, 702 S.E.2d at 375 (considering whether plaintiff "established [a physician's] *negligence* in failing to adequately disclose the formation necessary for a patient to give informed consent") (emphasis added). Moreover, Georgia's informed consent law is critically different than South Carolina's. Georgia law governs informed consent by a very narrow

statute. Id. at 779-80 (citing Ga. Code Ann. § 31-9-6.1). Since the state chooses to regulate physician disclosures by statute, Georgia "does not impose a general requirement of disclosure upon physicians." Id. at 780. Instead, the disclosure duty is limited to a statutory list that courts cannot not expand and must "strictly construe[]." Id. Unlike South Carolina's common-law based informed consent rule requiring disclosure of all "material risks," the Georgia statute only requires a physician to discuss the risk of "infection, allergic reaction, disfigurement, brain or heart damages, etc." Id. at 779 n. 9 (citing Ga. Code Ann. § 31-9-6.1(a)(1)-(6)). Albany Urology was constrained by Georgia's narrowly-written statute, but South Carolina courts are not.

The circuit court's other reason for rejecting Ms. Chabek's informed consent claim was stated as a practical concern that recognizing a surgeon's alcohol abuse as a "material risk" involved in surgery would unduly expand a physician's disclosure duty to immaterial complications in the physician's personal affairs. (R. pp. 18-20) (citing Duttry v. Patterson, 771 A.2d 1255 (Pa. 2001); Kaskie v. Wright, 589 A.2d 213 (Pa. Super. 1991)). However, this concern fails to account for a critical component of how informed consent claims work under South Carolina law. The scope of a physician's disclosure duty is not defined by the courts but is instead "measured by those communications a reasonable medical practitioner in the same branch of medicine would make under the same or similar circumstances." Melton v. Medtronic, Inc., 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010) (quoting Hook, 281 S.C. at 553, 316 S.E.2d at 698).

Accordingly, to prove an informed consent violation, Ms. Chabek must meet the same requirement imposed on any other medical malpractice claim by presenting expert testimony to show the risk in question was sufficiently "material" that a reasonable physician would have disclosed it before taking Ms. Chabek to surgery. Even though discovery has not even begun, Ms. Chabek met that burden. Dr. Sanford Davne, a board-certified orthopedic surgeon, stated by

affidavit that (1) he is familiar with the standard of care for a reasonably prudent neurosurgeon; and (2) Dr. Davidson failed to do what a reasonable surgeon would have done when he failed to disclose his substance abuse relapse before Ms. Chabek's spinal surgery. (R. p. 168 ¶¶ 2-3). Those opinions, which are unopposed and unchallenged, are sufficient to create a question of fact on the critical elements of Ms. Chabek's informed consent claim. This is further evidenced by this Court's rulings. In Fletcher, the Court reversed a circuit court order granting a directed verdict to a medical provider on its patient's informed consent claim. 390 S.C. at 465, 702 S.E.2d at 375. The patient had met her burden of proof by presenting expert testimony to show the risk of a thoracic duct injury during a bypass procedure was sufficiently material to require disclosure. Id. at 467, 702 S.E.2d at 376. The scope of a physician's disclosure is no different than his duty to act competently during the surgery itself. Both are governed by the standard of care, and compliance with both is for the jury to decide as guided by expert testimony.

Thus, the circuit court erred in "find[ing] as a matter of law" that Ms. Chabek's informed consent claim must fail because Dr. Davidson had no duty to disclose his alcohol abuse. (R. p. 17). South Carolina law required Dr. Davidson to warn of all the dangers associated with the proposed procedure and to obtain Ms. Chabek's informed consent on all "material risks" before proceeding to surgery. Hardee, 370 S.C. at 516, 636 S.E.2d at 631-32; Hook, 281 S.C. at 547, 316 S.E.2d at 694-95. South Carolina courts have recognized Ms. Chabek's right to control over her own medical choices, and that right is no less valid when the risk is a surgeon's ailment than when it is a physiological complication of the procedure. In ruling otherwise, the circuit court mistakenly relied on distinguishable persuasive authority and failed to recognize several other jurisdictions

recognize an informed consent claim under similar circumstances.[5] Finally, the circuit court's concern that allowing a claim under these circumstances would lead to an unmanageable informed consent doctrine fails to recognize that the scope of a physician's duty has always been a matter of medical judgment presented at trial through expert testimony that ultimately a jury must weigh.

3. The circuit court erred in granting summary judgment on Ms. Chabek's negligent supervision claim.

While the court did not specifically state the grounds for its dismissal of the negligent supervision claim, there was no argument that Ms. Chabek failed to sufficiently plead facts that would support this claim. As discussed above, the discovery rule states that a claim accrues only if an objectively reasonable layman in the plaintiff's shoes could have discovered her cause of action. Strong, 316 S.C. at 191-92, 447 S.E.2d at 852. Ms. Chabek's negligent supervision claim stems from her discovery of facts indicating AnMed was aware of Dr. Davidson's history of alcoholism and was aware of Dr. Davidson exhibiting signs and symptoms of alcoholism until late 2020. (R. pp. 153-54).

As such, even if this Court were to determine Ms. Chabek's medical negligence and informed consent claims were properly dismissed, her claim for negligent hospital supervision was timely.

[5] Considering physician-related risks "material" for informed consent purposes is also supported by multiple commentators. Sheldon F. Kurtz, "The Law of Informed Consent: From 'Doctor is Right' to 'Patient has Rights'" 50 SYRACUSE L. REV. 1243, 1258 (2000) (concluding that, even in jurisdictions that base their informed consent doctrine on the reasonable physician's view of material risks, "courts should conclude that . . . even the reasonable physician must and would disclose personal and financial information to the patient"); William J. McNichols, "Informed Consent Liability in a 'Material Information' Jurisdiction: What does the Future Portend?" 48 OKLA. L. REV. 711, 752-53 (1996) (arguing that courts "ought to recognize that, at least in some cases, withholding of information which is collateral to the medical aspects of a proposed treatment regimen ought properly to be considered" sufficient to support an informed consent claim").

CONCLUSION

Based on the arguments above, Appellants respectfully request the Court reverse the circuit court's summary judgment order. Ms. Chabek's medical negligence claim was timely because it could not have reasonably been discovered before August 2018, less than three years before Appellants filed their NOI on March 12, 2021. The circuit court's contrary ruling relies on a claimed accrual date that is not supported by the limited medical records presented, has not been adequately explored in discovery, and that must be weighed against Respondents' statements insisting Ms. Chabek's struggles were a normal part of the post-operative process. Ms. Chabek's informed consent claim was also timely because she first learned of Dr. Davidson's alcoholism in 2020, and a surgeon's active alcohol struggles are a material risk that Ms. Chabek's expert says a physician must disclose before proceeding to surgery. Similarly, Ms. Chabek's negligent supervision claim was also timely because she first learned the facts giving rise to this case of action in 2020 – namely, Dr. Davidson exhibiting signs and symptoms of an alcoholism relapse that AnMed should have identified and withdrawn operating privileges.

Respectfully submitted,

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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.

CERTIFICATE OF COUNSEL

Pursuant to Rule 211(a), SCACR, Appellants' counsel hereby certifies Appellants' Brief and Reply Brief comply with Rule 211(b), SCACR.

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