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

Anita and James Chabek,

APPELLANTS,

versus

AnMed Health and Larry Davidson, MD,

RESPONDENTS.

FINAL BRIEF OF RESPONDENTS

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II. The Trial Court properly granted summary judgment on Mrs. Chabek's informed consent claim.

A. The Trial Court's ruling that Mrs. Chabek could not maintain a claim for lack of informed consent arising out of the failure to disclose Dr. Davidson's substance abuse issues is not preserved for review on appeal because she did not challenge this ruling on reconsideration.

B. The Trial Court's grant of summary judgment to the Respondents on Mrs. Chabek's informed consent claim should be affirmed because she did not present to the Trial Court any competent evidence as to when any such claim allegedly began to accrue.

C. The Trial Court properly ruled that under South Carolina's law of informed consent for surgical procedures, there is no duty of a physician to disclose substance abuse issues.

D. The Trial Court's grant of summary judgment on Mrs. Chabek's informed consent claim should further be affirmed because such claim is merely an additional theory of negligence under a medical malpractice action which is barred by the three-year statute of limitations where she was on notice of a potential claim no later than March 7, 2018 and did not file suit until over three years later on March 12, 2021.

III. The Trial Court properly granted summary judgment on Mrs. Chabek's negligent supervision claim against AnMed because (1) AnMed owed no duty to Mrs. Chabek with respect to Dr. Davidson's alleged substance abuse issues; (2) she failed to present legally competent evidence as to the alleged accrual of the three-year statute of limitations; and (3) the three-year statute of limitations expired where she was on notice of a potential claim no later than March 7, 2018 and did not file suit until over three years later on March 12, 2021.

COUNTERSTATEMENT OF THE CASE

This case is a medical malpractice action which arises out of a spinal procedure performed by Respondent Larry Davidson, MD ("Dr. Davidson") on Anita Chabek on August 22, 2017. Appellants Anita and James Chabek contend that Mrs. Chabek experienced complications following the procedure as a result of Dr. Davidson's alleged negligence. They did not file an action against Respondents AnMed Health ("AnMed") and Dr. Davidson, however, until over three years later, outside of the applicable three-year statute of limitations. Therefore, the lower court properly granted summary judgment to the Respondents. The Chabeks have now appealed that ruling.

The Chabeks filed their Notice of Intent to File Suit on March 12, 2021 in the Court of Common Pleas for Anderson County against AnMed and Dr. Davidson. [R.pp. 24-39; NOI.] The Chabeks alleged that Dr. Davidson negligently performed surgery and caused injury to Anita Chabek on August 22, 2017. [R.p. 26; Id. at ¶ 5.] The Chabeks asserted causes of action for (1) medical negligence; (2) lack of informed consent; (3) negligent supervision; and (4) general negligence. [R.pp. 6-11; Id. at ¶¶ 25-48.] The Chabeks did not initially file supporting expert affidavits as required by S.C. CODE ANN. § 15-36-100(C)(1) because they believed the statute of limitations expired in March 2021 and needed additional time to obtain the affidavits. [R.p. 13; NOI, Ex. B.] The Chabeks filed their expert affidavits on April 21, 2021. [R.pp. 165-171; Affidavits.]

Thereafter, on May 11, 2021 and May 13, 2021 respectively, AnMed and Dr. Davidson both moved to dismiss the Chabeks' claims on the grounds that the action was barred by the applicable three-year statute of limitations set forth in S.C. CODE ANN. § 15-3-545(A). [R.pp. 98; 99; AnMed Mtn. to Dismiss; Davidson Mtn. to Dismiss.]

On June 8, 2021, the Chabeks submitted an Amended Statement of Facts containing allegations that they did not discover any alleged negligence until August 2018. [R.pp. 87-97; Am. Statement of Facts.]

AnMed and Dr. Davidson filed a joint memorandum and exhibits in support of their Motions to Dismiss or, in the alternative, Motions for Summary Judgment on July 8, 2021.[1] [R.pp. 100-149; Memo. with Exhibits.] The Chabeks filed a memorandum in opposition on July 20, 2021. [R.pp. 150-154; Memo. in Opp.] A hearing was held before The Honorable R. Lawton McIntosh on July 21, 2021. [R.pp. 55-82; Hearing Tr.]

After the hearing, on August 2, 2021, the Chabeks filed their Complaint after the required pre-suit mediation ended in an impasse.[2] [R.pp. 40-54; Compl.]

On September 15, 2021, the Trial Court issued a Form 4 Order which granted the Respondents' Motion for Summary Judgment based upon the expiration of the statute of limitations. This Form 4 Order requested defense counsel to prepare a formal order. [R.pp. 1-3; Form 4 Order Granting Summary Judgment.] Defense counsel e-mailed a proposed order granting summary judgment to the Trial Court and opposing counsel on September 17, 2021. [R.p. 174; Sept. 17, 2021 e-mail with proposed order.]

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[1] Rule 12(b) of the South Carolina Rules of Civil Procedure provides that "[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." The Chabeks did not object to the treatment of the motions to dismiss as motions for summary judgment.

[2] The Supreme Court has held that the pre-litigation pleadings (the notice of intent) and the litigation pleadings (the complaint) together comprise a single medical malpractice claim. Wilkinson v. E. Cooper Cmty. Hosp., Inc., 410 S.C. 163, 172-73, 763 S.E.2d 426, 431 (2014).

Before the Trial Court could issue the formal order, the Chabeks filed a motion on September 27, 2021 for reconsideration of the grant of summary judgment. [R.pp. 155-161; Mtn. to Reconsider.] The Trial Court denied the Motion to Reconsider in a Form 4 Order filed September 27, 2021. [R.pp. 4-6; Form 4 Order on reconsideration.] The Chabeks then filed and served their Notice of Appeal on or about October 4, 2021. The Trial Court subsequently issued the formal order granting summary judgment on November 17, 2021.[3] [R.pp. 7-23; Order.]

COUNTERSTATEMENT OF FACTS

On August 10, 2017, Anita Chabek was seen by Dr. Davidson, who at the time was a neurosurgeon with AnMed, where she complained of pain in her lumbar spine, right hip, and right leg accompanied by numbness, tingling, and weakness which had been present for two years and pain from a fall down the stairs in the prior year. [R.p. 126; Aug. 10, 2017 Med. Note.] Dr. Davidson further documented that Mrs. Chabek had been "dealing with at least several months of intense right-sided lumbar radicular pain involving the right buttock/thigh and leg," and an "MRI of the lumbar spine demonstrate[d] a right-sided L5/S1 synovial cyst." [R.p. 126; Id.]

Conservative measures, including pain management injections, heat, ice, naproxen, hydrocodone, gabapentin, topical rubs, and steroids, had failed to provide Mrs.

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[3] The Trial Court did not lose jurisdiction to issue the formal order granting summary judgment even though the Chabeks had already filed the Notice of Appeal. Rule 203(b)(1), SCACR provides "[w]hen a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment." This Court has held that pursuant to this rule, a trial court does not lose jurisdiction to sign the formal order even though the case has already been appealed. Doe v. Berkeley Publishers, 322 S.C. 307, 315-16, 471 S.E.2d 731, 735 (Ct. App. 1996), rev'd on other grounds, 329 S.C. 412, 496 S.E.2d 636 (1998).

Chabek with any relief, and she had not had any prior spine surgery. Mrs. Chabek indicated to Dr. Davidson that she was interested in pursuing surgical intervention which he believed would be appropriate. [R.p. 126; Id.]

Prior to the surgery, Dr. Davidson documented that he discussed with Mrs. Chabek and her husband the prospect of right-sided L5/S1 synovial cyst resection and also thoroughly discussed the technical aspects of the procedure, as well as the potential risks, realistic limitations, and benefits of the procedure. Among the specific risks documented to have been discussed by Dr. Davidson were the risks of infection, wound healing difficulties, hemorrhage, CSF leak, recurrence of symptoms, spinal destabilization, paralysis, nerve injury, worsening of symptoms or neurologic status, and the need for subsequent surgery for any of the above complications. He also discussed that there was no guarantee that the desired results would be obtained with surgery. [R.p. 126; Id.]

Mrs. Chabek underwent surgery on August 22, 2017, including resection of a right-sided L5/S1 synovial cyst. [R.pp. 88; 127-128; Am. Statement of Facts, ¶ 5; Aug. 22, 2017 Med. Note.] In his operative note, Dr. Davidson documented that there were no complications during the procedure and in relevant part described the procedure as follows:

> Ultimately, a right L5 hemilaminotomy [involves removing part of one of the two laminae on a vertebra to relieve excess pressure] and partial medial facetectomy [involves removing part of the facet joint on the side close to the midline to the backbone] was performed. The underlying synovial cyst was identified and significant compression of the dura is noted. The cyst was dissected off and peeled away from the dura eliminating its mass effect on the neural structures. Of course, this was performed with loupe magnification. Reinspection of the epidural space suggested the neural elements to be very nicely decompressed.

[R.pp. 127-128; Aug. 22, 2017 Med. Record, pp. 1-2.]

Mrs. Chabek's post-operative complaints began six days later on August 28, 2017 when she called Dr. Davidson's office stating she was having a lot of pain in her right leg and could not get comfortable. [R.p. 130; Aug. 28, 2017 Med. Note.] On September 1, 2017, Mrs. Chabek was seen in the office for a wound assessment. The incision did not show any signs of infection. Mrs. Chabek continued to complain of pain in her right hip and leg and stated she also had some numbness in the right leg as well. She had been taking one hydrocodone tablet every five hours. Mrs. Chabek had also taken Advil, which she reported had helped with the pain some. [R.p. 131; Sept. 1, 2017 Note.]

Mrs. Chabek returned to the office on September 13, 2017 for a second wound assessment. She continued to complain of right hip and leg pain and was prescribed a Medrol dose pack for the pain. [R.p. 132; Sept. 13, 2018 Med. Note.] On September 28, 2017, Mrs. Chabek saw her primary care physician, Dr. Clifton Straughn, and reported that she was "frustrated" it had been five weeks since her back surgery and she was not feeling much better. [R.p. 133; Sept. 28, 2017 Med. Note.] On October 4, 2017, her pain medication was refilled. [R.p. 134; Oct. 4, 2017 Med. Note.]

On October 5, 2017, Mrs. Chabek was seen by physician assistant Travis Jeffcoat at AnMed, who documented that she continued to complain of right lower extremity radicular pain. PA Jeffcoat discussed continuing her pain medication and advised her to continue with exercises at the YMCA pool as a part of her recovery process, noting that she was "still fairly early on in the surgical process." He noted he would plan to see her in four to six weeks for further evaluation. [R.p. 135; Oct. 5, 2017 Med. Note.]

PA Jeffcoat saw Mrs. Chabek again on November 16, 2017. She continued to complain of leg and back pain and a problem with her gait and also reported that she had fallen on a wet floor since her last visit. PA Jeffcoat documented that she continued to complain of right lower extremity pain and numbness. While PA Jeffcoat discussed with Mrs. Chabek that it could take some time for the radicular pain to improve, he noted that they may need to consider another MRI if she did not show significant improvement in the next four to six weeks. [R.p. 136; Nov. 16, 2017 Med. Note.]

On December 12, 2017, Mrs. Chabek requested another refill of her pain medication from AnMed. [R.p. 137; Dec. 12, 2017 Med. Note.] She called the office again on December 21, 2017 complaining of "sciatic nerve pain." The registered nurse who documented the call made a note inquiring whether the MRI should be ordered. [R.p. 138; Dec. 21, 2017 Med. Note.]

On January 11, 2018, Mrs. Chabek once again called the office complaining of back and left leg pain and further reported that she could not put pressure on the leg. [R.p. 139; Jan. 11, 2018 Med. Note.]

Mrs. Chabek subsequently had an MRI of her lumbar spine on January 15, 2018. Radiologist Dr. Thomas Wiggins compared this MRI to the one done in August 2017 and reported in relevant part the following:

> Marrow signal: in the left L5 pedicle and facet suggesting a combination of stress reaction and changes secondary to arthritis in L5-S1 facet joint on the left.
> L4-L5: Mild disc dehydration consistent with mild degenerative disc disease. Mild facet joint arthritis. There is a small synovial cyst projecting medially from the right facet joint measuring 6 x 3 x 12mm. This results in mild impingement on the right posterior lateral aspect of the thecal sac. This is a new finding when compared to the previous study.
> L5-S1: Compared with the prior study, the patient has undergone a right laminectomy and resection of the inferior L5 facet. Postoperative

> granulation tissue in the operative site with some enhancing granulation tissue around the right S1 nerve root. Moderate facet joint arthritis on the left.

[R.p. 140; Jan. 15, 2018 Med. Note, p. 1.]

Dr. Wiggins's overall impression was that Mrs. Chabek had a small synovial cyst projecting medially from the right L4-5 facet joint with mild impingement on the right posterior lateral aspect of the thecal sac, and she had moderate facet joint arthritis on the left at L5-S1 with edema in the left L5 pedicle consistent with a stress reaction. [R.pp. 140-141; Id. at pp. 1-2.]

Mrs. Chabek saw PA Jeffcoat again on January 18, 2018. He documented that she continued to complain of low back pain and bilateral leg pain as well as a recent onset of left posterior hip discomfort without any known cause. PA Jeffcoat explained to Mrs. Chabek that the MRI did show a small synovial cyst, but he would not recommend excision at that time. He also reported that there did not appear to be a recurrent disc herniation on her MRI, but he did discuss with Mrs. Chabek that she should undergo flexion and extension x-rays to see if she had "any obvious instability of the lumbar spine." [R.p. 142; Jan. 18, 2018 Med. Note.]

On January 31, 2018, Mrs. Chabek called the office once again asking for a refill on her pain medication and also reported that while she was supposed to have undergone an x-ray, she had not done so yet due to financial reasons. [R.p. 143; Jan. 31, 2018 Med. Note.] Mrs. Chabek stopped by the AnMed office to pick up the prescription on February 1, 2018, and after she left, she called the office and stated she was having the same amount of pain in her right leg. She reported that the script was written for her to take medication "every 6 hours where it was every 4 hours," and "[s]he asked if [PA Jeffcoat]

knew what he was doing since he wrote the script." [R.p. 144; Feb. 1, 2018 Med. Note.] She called the office again on February 7, 2018, stating her pain medication was not helping and that she did not "know what to do at this point with the pain in her leg." She asked if she should go to pain management. [R.p. 145; Feb. 7, 2018 Med. Note.]

On February 28, 2018, Mrs. Chabek saw Pain Management Specialist Dr. Eric Loudermilk at Piedmont Comprehensive Pain Management, who documented that her MRI showed a right-sided laminectomy with a facet joint resection at the L5 level and some moderate arthritis and edema on the left side at L5-S1 around the facet and pedicle suggestive of a stress reaction. Dr. Loudermilk noted that Mrs. Chabek would undergo an EMG the next day to evaluate the persistent pain in her right leg. [R.p. 146; Feb. 28, 2018 Med. Note.]

On March 1, 2018, Dr. Paul Brill, a neurologist, reported that Mrs. Chabek's EMG was "essentially normal," but "[m]ild isolated spontaneous activity [was] seen in the right lumbar paraspinal muscles, adjacent to the patient's scar." He noted that this was a nonspecific finding and "could be related to her surgery." [R.p. 147; Mar. 1, 2018 Med. Note.]

Mrs. Chabek returned to see PA Jeffcoat on March 6, 2018 and continued to complain of low back pain and right lower extremity radicular symptoms. After reviewing the MRI showing the new cyst at L4-L5 as well as "what appears to be a medial facetectomy of right L5-S1," PA Jeffcoat discussed the possibility of a CT myelogram of the lumbar spine to evaluate the integrity of the right L5-S1 facet joint, and noted, "If she indeed has missing medial facet she could be dealing with some degree of instability even though this is not identified on flexion and extension films. This also

could be contributing to right L5-S1 foraminal collapse resulting in continued lower extremity pain." PA Jeffcoat documented that he discussed all of the above with both Mrs. Chabek and her husband. Mrs. Chabek wanted to hold off on the myelogram for a few weeks, and she wanted to attempt physical therapy prior to any additional imaging. [R.p. 148; Mar. 6, 2018 Med. Note.]

On March 7, 2018, Kristin Jennings from AnMed documented that she called Mrs. Chabek to set up an appointment with Dr. MacDonald, another neurosurgeon in the office, but when she did not hear back from Mrs. Chabek, she called Mr. Chabek, who indicated that his wife was not happy with the office and did not want to come back. [R.p. 149; Mar. 7, 2018 Med. Note.] This was the last noted contact between the Chabeks and AnMed concerning Mrs. Chabek's medical issues.

On March 12, 2021, the Chabeks filed their Notice of Intent to File Suit against the Respondents alleging that the Respondents were negligent for "removal of an excessive portion of the L5-S1 facet joint" and failure to "install instrumentation and perform fusion to properly support the spine following a partial medial facetectomy" during a "right-sided L5/S1 synovial cyst removal" and alleged failure "to properly inform Ms. Chabek of the available alternative treatments." [R.p. 170; Aff. of Sanford H. Davne, M.D. ¶ 4.] In their Amended Statement of Facts, the Chabeks alleged that they did not discover that Mrs. Chabek's pain was likely due to a fractured facet joint until August 2018 when she received a second opinion from another medical provider. [R.p. 91; Am. Statement of Facts, ¶¶ 22-24.]

The Trial Court granted summary judgment to the Respondents on all claims asserted by the Chabeks, specifically finding (1) the medical malpractice and negligence

claims were barred by the expiration of the three-year statute of limitations set forth in S.C. CODE ANN. § 15-3-545(A); (2) the informed consent claim failed as a matter of law because Dr. Davidson had no legal duty to disclose his issues with alcohol; (3) the continuous treatment rule did not extend the limitations period for the Chabeks to file their claims; and (4) any claims by James Chabek for loss of household services was also barred by the statute of limitations. [R.pp. 7-23; Order Granting Summary Judgment.] The Chabeks do not challenge in this appeal the Trial Court's rulings on the continuous treatment doctrine or on Mr. Chabek's claim for loss of household services.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. Ellis v. Davidson, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004). Rule 56(c) provides a motion for summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment." Id. at 42, 747 S.E.2d at 181-82; Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d

433, 438 (2003) (citations omitted). The party seeking summary judgment under Rule 56(c) has the initial burden of demonstrating the absence of a genuine issue of material fact. Ellis, 358 S.C. at 518, 595 S.E.2d at 822. "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. . . . Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 518-19, 595 S.E.2d at 822; see also Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) ("Once [the] moving party carries its initial burden, [the] opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial. . . . Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings.") (internal citations omitted).

"[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Ellis, 358 S.C. at 518, 595 S.E.2d at 822. Summary judgment is also appropriate when a plaintiff does not commence an action within the applicable statute of limitations." McMaster v. Dewitt, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014); see Kreutner v. David, 320 S.C. 283, 286–87, 465 S.E.2d 88, 90 (1995) (affirming the circuit court's order granting summary judgment because the statute of limitations had run).

ARGUMENT

I. The Trial Court properly granted summary judgment as a matter of law to the Respondents on Mrs. Chabek's medical malpractice and negligence claims because the three-year statute of limitations set forth in S.C. CODE ANN. § 15-3-545(A) barred her claims where she was on notice of a potential claim and injury by no later than March 7, 2018 but did not file suit until over three years later on March 12, 2021.

The Chabeks brought this medical malpractice action against the Respondents alleging the Respondents were grossly negligent and failed to comply with the standard of care during Mrs. Chabek's August 22, 2017 surgery by (1) failing to exercise the technical skills expected to be employed by a reasonably prudent neurosurgeon; (2) failing to provide informed consent; (3) failing to properly inform supervisors and staff; and (4) failing to properly supervise its physicians. [R.pp. 89-90; Am. Statement of Facts, ¶ 17.] The Trial Court ruled the Respondents were entitled to summary judgment on these claims because the applicable three-year statute of limitations provided under S.C. CODE ANN. § 15-3-545(A) had expired. The record is undisputed that by no later than March 7, 2018, Mrs. Chabek was on notice of sufficient facts and circumstances that she might have a claim against another party, but she did not file suit until over three years later on March 12, 2021 after the statute of limitations had expired. Therefore, this Court should affirm the Trial Court's grant of summary judgment to the Respondents.

Statutes of limitation "'are designed to promote justice by forcing parties to pursue a case in a timely manner.'" Gibson v. Bank of Am., N.A., 383 S.C. 399, 410, 680 S.E.2d 778, 784 (Ct. App. 2009) (quoting State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413 (2000)). As this Court has observed;

> Statutes of limitation . . . protect people from being forced to defend themselves against stale claims. The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less

> reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense. Additionally, statutes of limitation encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately.

Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 163-64, 511 S.E.2d 699, 706 (Ct. App. 1999).

Statutes of limitations aim to relieve the courts of the burden of trying stale claims when a plaintiff has slept on her rights. McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989). The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005).

S.C. CODE ANN. § 15-3-545(A) provides that a plaintiff must bring a medical malpractice action "within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered." The courts apply the discovery rule to determine when an action accrues. Under the discovery rule, the statute begins to run when "'the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.'" McMaster v. Dewitt, 411 S.C. 138, 145, 767 S.E.2d 451, 454 (Ct. App. 2014) (quoting Knox v. Greenville Hosp. Sys., 362 S.C. 566, 570, 608 S.E.2d 459, 462 (Ct. App.2005)).

The standard as to when the statute of limitations begins to run is objective rather than subjective. Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994);

Gibson, 383 S.C. at 406, 680 S.E.2d at 782. Therefore, the test is not whether the particular plaintiff actually knew a claim is existed. Young v. S.C. Dep't of Corr., 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999). The test is when a person **could or should have known** through reasonable diligence that some cause of action exists against another person rather than when a person obtains actual knowledge of a potential claim or of the facts giving rise thereto. Dorman v. Campbell, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct. App. 1998).

In the medical malpractice context, it is **not** the date that the patient discovers that her physician's negligent conduct was the cause of her injury which triggers the running of the statute of limitations; rather, under the discovery rule, "the event that commences the running of the statute of limitations is the injury, *if* the facts and circumstances are such that a reasonable person would inquire into whether the injury gives rise to a claim against the defendant." McMaster, 411 S.C. at 148, 767 S.E.2d at 456 (emphasis in original); see also Arant v. Kressler, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (rejecting appellant's contention that "the time of the discovery is the time when the treating physician's actual negligence becomes known.").

The key element of reasonable diligence is notice. Reasonable diligence requires that a party act with some promptness where facts and circumstances would put a person on notice that some right has been invaded or that some claim against another party might exist. Gibson, 383 S.C. at 406, 680 S.E.2d at 782; see also Dean v. Ruscon Corp., 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). The statute begins to run at this point and **not** when:

- the advice of counsel is sought;
- a full-blown theory of recovery is developed; or

- the injured party comprehends the full extent of the damage.

Gibson, 383 S.C. at 406, 680 S.E.2d at 782; see also Dean, 321 S.C. at 363-64, 468 S.E.2d at 647; Wiggins, 314 S.C. at 128, 442 S.E.2d at 170; Dorman, 331 S.C. at 184-85, 500 S.E.2d at 789; Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Ct. App. 1998).

The date of discovery is also **not** when the plaintiff discovers a witness to support or prove her case or otherwise discovers evidence actually supporting the potential claim. Johnson v. Bowen, 313 S.C. 61, 64-65, 437 S.E.2d 45, 47 (1993); McClain v. Jarrard, 354 S.C. 218, 221, 580 S.E.2d 763, 764 (Ct. App. 2003) (internal citation omitted).

Where there is no conflicting evidence or where only one reasonable inference can be drawn from the evidence, the trial court should determine as a matter of law when a party knew or should have known it had a claim. Gibson, 383 S.C. at 406-07, 680 S.E.2d at 782.

The undisputed evidence before the Trial Court established that Mrs. Chabek was on notice of an injury under facts and circumstances that would require a reasonable person to inquire and begin to investigate whether such injury gave rise to a claim against another party by no later than March 7, 2018. Mrs. Chabek's post-operative pain in her right leg, which she noted was a lot of pain, began only six days after her surgery. [R.p. 130; Aug. 28, 2017 Med. Note.] She continued to complain of right hip and leg pain as well as numbness in the right leg during a September 1, 2017 office visit. [R.p. 131; Sept. 1, 2017 Med. Note.] During a September 13, 2017 office visit, Mrs. Chabek continued to report persistent right hip and leg pain. [R.p. 132; Sept. 13, 2017 Med. Note.] She complained to her primary care physician on September 28, 2017, approximately five

weeks after her surgery, that she was frustrated because she did not feel much better. [R.p. 133; Sept. 28, 2018 Med. Note.]

Mrs. Chabek's complaints of right lower extremity radicular pain, numbness, and back pain continued during October 5, 2017 and November 16, 2017 office visits with PA Jeffcoat. PA Jeffcoat did relay to Mrs. Chabek that she was still fairly early on in the surgical process and that it could take some time for the pain to improve. He also informed her, however, that if she did not show significant improvement, they needed to consider an MRI. [R.pp. 135; 136; Oct. 5, 2017 and Nov. 16, 2017 Med. Notes.] This was an early indication to Mrs. Chabek that if her medical team felt further investigation was needed into her pain, that the pain might not be a normal and natural consequence of the surgery and she may have suffered an injury from the surgery.

Mrs. Chabek complained of sciatic nerve pain on December 21, 2017 and made further complaints of left leg pain and back pain on January 11, 2018. She further stated she could not put pressure on her left leg. The MRI was scheduled to investigate and determine why she was continuing to have extreme pain over four months after the August 22, 2017 surgery. [R.pp. 138; 139; Dec. 21, 2017 Med. Note; Jan. 11, 2018 Med. Note.]

The MRI which was performed on Mrs. Chabek on January 15, 2018, while showing some post-operative expected changes, also showed Mrs. Chabek had a small synovial cyst projecting medially from the right L4-5 facet joint with mild impingement on the right posterior lateral aspect of the thecal sac and also had moderate facet joint arthritis on the left at L5-S1 with edema in the left L5 pedicle consistent with a stress reaction. [R.pp. 140-141; 142; Jan. 15, 2018 Med. Note; Jan. 18, 2018 Med. Note.]

When her complaints of bilateral leg and back pain continued, PA Jeffcoat discussed with Mrs. Chabek during a January 18, 2018 office visit that she should consider "flexion and extension x-rays to see if she has any obvious instability of the lumbar spine." [R.p. 142; Jan. 18, 2018 Med. Note.] Again, this was another indication to Mrs. Chabek that her pain might not be stemming from the natural and normal consequences of the surgery as PA Jeffcoat was suggesting further tests to determine the cause of her pain.

On February 1, 2018, Mrs. Chabek reported continued pain in her right leg, and again on February 7, 2018, she reported her pain medication was not helping and she did not know what to do at this point about the pain in her leg. [R.pp. 144-145; Feb. 1 and 7, 2018 Notes.]

After having an EMG on March 1, 2018, Dr. Paul Brill, a neurologist, noted that Mrs. Chabek's EMG was "essentially normal," but "[m]ild isolated spontaneous activity [was] seen in the right lumbar paraspinal muscles, adjacent to the patient's scar." He also observed that this was a nonspecific finding and "could be related to her surgery." [R.p. 147; Mar. 1, 2018 Med. Note.]

Mrs. Chabek was last seen on March 6, 2018 by a medical provider at AnMed when she returned to see PA Jeffcoat. She continued to complain of low back pain and right lower extremity radicular symptoms. After reviewing the MRI and specifically noting "what appears to be a medial facetectomy of right L5-S1," PA Jeffcoat discussed with both Mrs. Chabek and her husband the possibility of a CT myelogram of the lumbar spine to evaluate the integrity of the right L5-S1 facet joint. He further noted, "If she indeed has missing medial facet she could be dealing with some degree of instability even though this is not identified on flexion and extension films. This also could be

contributing to right L5-S1 foraminal collapse resulting in continued lower extremity pain." Despite being given this information, Mrs. Chabek wanted to hold off on the myelogram for a few weeks. [R.p. 148; Mar. 6, 2018 Med. Note.] The Chabeks then ended their relationship with AnMed on March 7, 2018 and expressed dissatisfaction with the practice. [R.p. 149; Mar. 7, 2018 Med. Note.]

Mrs. Chabek had months of increasing leg, hip, and back pain following her August 22, 2017 surgery to the point that over four months after the surgery she could not put any pressure on her left leg and did not know what to do about the pain in her leg. [R.pp. 139; 145; Jan. 11, 2018 Med. Note; Feb. 7, 2018 Med. Note.] If Mrs. Chabek had not been aware despite months of abnormal pain that she had an injury for which she might have a potential claim arising out of her surgery, the information provided during the March 6, 2018 office visit certainly alerted her to that fact that the integrity of her right L5-S1 facet joint was potentially compromised and unstable, likely due to a missing medial facet. [R.p. 148; Mar. 6, 2018.] By this point, any reasonable person would realize that the surgery had not only failed to improve her previous condition but had likely worsened her condition and would be put on notice that a claim against another party might exist. In fact, the Chabeks did express dissatisfaction with AnMed and ended their relationship with the practice the very next day on March 7, 2018. [R.p. 149; Mar. 7, 2018 Med. Note.]

S.C. CODE ANN. § 15-3-545(A)'s three-year statute of limitations therefore began to run no later than March 7, 2018. The statute of limitations on any claim by Mrs. Chabek against the Respondents thus expired on March 7, 2021. The Chabeks did not file an action against the Respondents until March 12, 2021 outside of the statute of

limitations. Their medical malpractice action and all attendant claims are therefore time barred as a matter of law, and the Trial Court correctly granted summary judgment to the Respondents and dismissed the Chabeks' lawsuit.

The Chabeks contest the Trial Court's ruling for several reasons, none of which merit reversal of Trial Court's grant of summary judgment. First, the Chabeks wrongly argue that a medical negligence claim does not accrue until the plaintiff has available to her "all the information" required to know that a malpractice claim against her physician may exist. See Appellant's Brief, Argument Section 1, p. 8. This is a plain misstatement of the discovery rule under statute of limitations jurisprudence.

The discovery rule does not require that the plaintiff have all information available to her regarding a claim against another to trigger the running of the statute of limitations. Rather, the plaintiff must only have sufficient information which, if diligently pursued, would have led to the knowledge of a claim. "In applying the discovery rule, inquiry is focused upon whether the complaining party acquired knowledge of **any** existing facts sufficient to put said party on inquiry which, if developed, will disclose the [claim]." Burgess v. Am. Cancer Soc., S.C. Div., Inc., 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989) (emphasis added) (internal citation omitted). The appellate courts have emphasized time and time again the statute of limitations does not begin running only when the plaintiff has actual knowledge of her claim or full knowledge of the extent of her injury. See, e.g., Young, 333. S.C. at 719-21, 511 S.E.2d at 416-17.

Second, the Chabeks contend that they were not put on notice of any potential claim against the Respondents until August 2, 2018 when Mrs. Chabek underwent a round of diagnostic tests to receive a second opinion from Advance Spine and where the

imaging from these tests showed a "right fractured L5 facet joint" and instability which could correlate to her right leg pain. Yet on March 6, 2018, PA Jeffcoat advised Mrs. Chabek and her husband that the "integrity of the right L5-S1 facet joint" should be investigated because if she "indeed ha[d] a missing medial facet," that could be contributing to instability and to "right L5-S1 foraminal collapse" causing the lower extremity pain. This information, given to the Chabeks on March 6, 2018, triggered their duty to act with reasonable diligence to discover whether a claim existed against some other party and thus also started the clock on the running of the statute of limitations.

Despite this information, the Chabeks -- not PA Jeffcoat as they contend in their brief -- chose to delay further imaging and testing at the March 6, 2018 visit. [R.p. 148; Mar. 6, 2018 Med. Note ("[Mrs. Chabek" would like to consider the myelogram but hold off for the next few weeks."). The Chabeks completely ended their relationship with AnMed the very next day after being given information that her right L5-S1 facet joint should be further evaluated for a missing medial facet and as to its instability. [R.p. 149; Mar. 7, 2018 Med. Note.]

By March 6, 2018, and certainly on March 7, 2018 when they ended their relationship with AnMed, the Chabeks were on notice of sufficient facts requiring them to exercise reasonable diligence to discern whether any right had been invaded or if any claim existed against another party. It was at this point, and not on August 2, 2018, when they learned further confirming information, that the statute of limitations started to run on any claim they had against the Respondents. The commencement of the statute of limitations is not delayed until the plaintiff discovers a witness to support or prove her case, Johnson, 313 S.C. at 64-65, 437 S.E.2d at 47, or otherwise discovers evidence

actually supporting the potential claim. McClain, 354 S.C. at 221, 580 S.E.2d at 764 (internal citation omitted). The statute of limitations is also not tolled until the plaintiff actually discovers the negligent conduct that caused her injury. Arant, 327 S.C. at 229, 489 S.E.2d at 208 (finding the time of discovery for the accrual of the statute of limitations is not when the physician's actual negligence becomes known); McMaster, 411 S.C. at 148, 767 S.E.2d at 456 (same).

In fact, the alleged negligence of which the Chabeks now complain -- the removal of an excessive portion of the right L5-S1 facet joint -- was specifically referenced as a potential issue during the March 6, 2018 office visit with PA Jeffcoat -- the possibility of a missing medial facet causing instability of the right L5-S1 facet joint. [R.pp. 170; 148; Davne Aff., ¶ 4; Mar. 6, 2018 Med. Note.] It is undisputed that this March 6, 2018 visit put the Chabeks on inquiry notice of the very alleged negligence for which they would later sue the Respondents. Only one reasonable inference can be drawn from the evidence -- that the facts and circumstances of the March 6, 2018 office visit and the Chabeks' termination of their relationship with AnMed the next day on March 7, 2018 put the Chabeks on notice that some claim against the Respondents might exist. Therefore, the three-year statute of limitations began to accrue no later than March 7, 2018. The Chabeks' suit filed on March 12, 2021 was time barred as a matter of law.

Third, the Chabeks argue that the Trial Court should not have granted summary judgment because they had not had a chance to participate in discovery. In order to argue that summary judgment should not be granted until discovery is complete, "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a "fishing

expedition."'" Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991)).

The only issue at stake for the motion for summary judgment on the statute of limitations was when the Chabeks were on notice of facts and circumstances requiring them to act with reasonable diligence to discover if some claim might exist against another party. When the Chabeks became aware of such facts and circumstances is evidence in their possession; accordingly, there is nothing they could learn through discovery that would not already be known to them. See Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 128-29, 542 S.E.2d 736, 743 (Ct. App. 2001) (affirming grant of summary judgment where record in the case did not demonstrate that further discovery would have contributed to the resolution of the issue at hand -- namely, whether the statute of limitations barred the plaintiff's action).

The issue under the discovery rule for statute of limitations purposes is what the Chabeks knew and when they knew it. See McMaster, 411 S.C. at 147-48, 767 S.E.2d at 456. The Chabeks would know if certain information was or was not communicated to them. Additional discovery would not lead to information already within their knowledge.

Finally, the Chabeks challenge the Trial Court's grant of summary judgment because the Respondents allegedly misled Mrs. Chabek into believing that her post-operative struggles were part of the normal recovery process and because post-operative complications and pain are not indicative of a medical malpractice claim. It is true that some of the earlier medical records following Mrs. Chabek's surgery indicated that pain was a normal part of the post-operative process. [R.pp. 135; 136; Oct. 5, 2017 Med. Note

(noting that Mrs. Chabek was "still fairly early on in the surgical process"); Nov. 16, 2017 Med. Note (advising Mrs. Chabek that "it could take some time for this radicular pain to improve.").

Later medical records, however, showed that Mrs. Chabek's medical providers were actively searching for other causes of her continued and worsening pain. [R.pp. 139; 142; 148; Jan. 11, 2018 Med. Note (noting Mrs. Chabek scheduled for MRI for continued pain); Jan. 18, 2018 Med. Note (planning for flexion and extension x-rays to determine whether Mrs. Chabek had any obvious instability of the lumbar spine); Mar. 6, 2018 Med. Note (advising Mrs. Chabek to undergo myelogram to evaluate the integrity of the right L5-S1 facet joint and to determine if she had missing medial facet).

These uncontradicted medical records show that Mrs. Chabek's medical providers were no longer considering her worsening pain as simply post-operative pain. While Mrs. Chabek claims in her pleadings that she was only told by her medical providers that the pain and complications she was experiencing were known risks of her surgery and that she therefore had no reason to suspect that complications were possibly due to alleged medical malpractice, [R.p. 91; Am. Statement of Facts, ¶¶ 20-21], the Chabeks cannot merely rest on allegations contained in their pleadings to defeat the Respondents' motion for summary judgment. Rather, the Chabeks must come forward with specific facts showing that there is a genuine issue for trial. Ellis v. Davidson, 358 S.C. 509, 518-19, 595 S.E.2d 817, 822 (Ct. App. 2004).

The Chabeks submitted no affidavits or other evidence showing that the Respondents allegedly misled them throughout the post-operative process. "Where a plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual

showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." Humana Hosp.–Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991). The Chabeks cannot contradict the medical records and defeat the Respondents' motion for summary judgment by only pointing to and relying upon their pleadings.

Furthermore, the Chabeks ended their relationship with AnMed on March 7, 2018. [R.p. 149; Mar. 7, 2018 Med. Note.] At that point, the Chabeks were no longer relying upon anything allegedly said or not said by the Respondents. See Strong v. Univ. of S.C. Sch. of Med., 316 S.C. 189, 191-92, 447 S.E.2d 850, 852 (1994) (observing that after the physician-patient relationship ends, reliance by the patient upon the physician also ends and the statute of limitations begins to run).

Considering all of the facts and circumstances, including Mrs. Chabek's continued pain, information given to her that she needed further tests to evaluate the integrity of her L5-S1 facet joint, and her dissatisfaction with AnMed and her termination of her relationship with AnMed, by no later than March 7, 2018, the Chabeks were certainly on notice that some claim might exist and were charged at that point with a duty to act with reasonable diligence and promptness to investigate and pursue their claims.

Under the three-year statute of limitations, the Chabeks were required to file any claim against the Respondents by March 7, 2021 and they failed to do so within that time. While the Chabeks may have received a second opinion on August 2, 2018, this second opinion did not restart the running of the statute of limitations because, as the courts have reiterated, it is not the date that the patient discovers the actual negligence that triggers

the running of the statute of limitations. That clock began running no later than March 7, 2018. The Chabeks had a full three years from March 7, 2018 to investigate and file suit against the Respondents. According to the Chabeks, they did investigate and became aware of the actual alleged negligent act on August 2, 2018, yet they still delayed in filing suit. The Trial Court therefore properly granted summary judgment to the Respondents as a matter of law because the Chabeks did not file their action within the three-year statute of limitations.

II. The Trial Court properly granted summary judgment on Mrs. Chabek's informed consent claim.

The Chabeks also alleged that the Respondents had a duty to disclose to Mrs. Chabek that Dr. Davidson was an alcoholic, was currently dealing with an alcohol substance abuse relapse, and increased his frequency of drinking to every day that he was not on call by October 2017 -- after Mrs. Chabek underwent her August 22, 2017 surgery. [R.pp. 88, 92-93; Am. Statement of Facts, ¶¶ 6-8, 29-33.] The Chabeks argued to the Trial Court that that the statute of limitations did not begin to run on this claim until November 2020 when the Chabeks allegedly learned of Dr. Davidson's substance abuse issues. [R.pp. 159-160; Mtn. to Reconsider, pp. 5-6.] The Trial Court found that the Respondents had no duty to disclose Dr. Davidson's substance abuse issues to the Chabeks.

A. The Trial Court's ruling that Mrs. Chabek could not maintain a claim for lack of informed consent arising out of the failure to disclose Dr. Davidson's substance abuse issues is not preserved for review on appeal because she did not challenge this ruling on reconsideration.

Rather than specifically ruling on whether the statute of limitations had expired on any lack of informed consent claim, the Trial Court ultimately determined that Mrs.

Chabek could not 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. [R.pp. 17-20; Formal Order Granting Summary Judgment, pp. 11-14.] The Chabeks did not challenge this ruling by the Trial Court below and have not preserved this issue for appeal.

The Trial Court issued a Form 4 Order on September 15, 2021 granting summary judgment to the Respondents due to the expiration of the statute of limitations and requested the Respondents to prepare a formal order. [R.pp. 1-3; Form 4 Order.] The Respondents e-mailed the proposed order to the Trial Court and opposing counsel on September 17, 2021. [R.p. 174; Sept. 17, 2021 e-mail with proposed order.]

Before the Trial Court could issue the formal order, on September 27, 2021, the Chabeks filed a motion for reconsideration of the grant of summary judgment. [R.pp. 155-161; Mtn. to Reconsider.] In this motion, the Chabeks only argued that the lack of informed consent claim was not time barred because the statute of limitations did not begin to run on such claim until November 2020. [R.pp. 159-160-; Mtn. to Reconsider, pp. 5-6.] The Trial Court denied the motion for reconsideration in a Form 4 Order filed September 27, 2021, and the Chabeks filed and served this appeal on or about October 4, 2021. [R.pp. 4-6; Form 4 Order on reconsideration.] The Trial Court subsequently issued the formal order granting summary judgment on November 17, 2021. This order specifically found for the first time that Mrs. Chabek could not maintain a claim for lack of informed consent relating to Dr. Davidson's substance abuse issues because there was

no duty of Dr. Davidson to disclose his personal issues under South Carolina law. [R.pp. 7-23; Formal Order.]

Because the Chabeks had already appealed, they never challenged the Trial Court's ruling that the Respondents had no duty to disclose Dr. Davidson's purported substance abuse issues. "When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (citing Godfrey v. Heller, 311 S.C. 516, 429 S.E.2d 859 (Ct. App. 1993) (finding when a theory of relief was first raised in the lower court's order, the appellant must challenge this theory with a Rule 59, SCRCP, motion)).

The Trial Court's ruling that the Respondents had no duty to disclose Dr. Davidson's purported substance abuse issues was never challenged by the Chabeks. The Chabeks are now precluded from raising this issue on appeal.

B. The Trial Court's grant of summary judgment to the Respondents on Mrs. Chabek's informed consent claim should be affirmed because she did not present to the Trial Court any competent evidence as to when any such claim allegedly began to accrue.

Assuming the issue is preserved for review, the Trial Court's grant of summary judgment should be affirmed because the Chabeks did not present any legally sufficient evidence on the accrual of the alleged informed consent claim in the form of affidavits or otherwise but, instead, merely made these allegations in their pleadings and memoranda which cannot defeat the Respondents' motion for summary judgment on the grounds that the statute of limitations had expired. See Humana Hosp.–Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991); Ellis v. Davidson, 358 S.C. 509, 518-19, 595

S.E.2d 817, 822 (Ct. App. 2004) ("Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings."). This Court should affirm on the basis that the Chabeks did not present any competent evidence to the Trial Court as to when the statute of limitations began to accrue on any claim regarding informed consent.[4]

C. The Trial Court properly ruled that under South Carolina's law of informed consent for surgical procedures, there is no duty of a physician to disclose substance abuse issues.

The Trial Court also correctly ruled that Mrs. Chabek could not maintain a separate and independent claim for lack of informed consent for failure to disclose Dr. Davidson's substance abuse issues. Under the doctrine of informed consent, a physician in South Carolina who performs a diagnostic, therapeutic, or surgical procedure has a duty to 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).

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[4]While the Trial Court did not rule upon this ground in granting the motion for summary judgment, "[t]he appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 527 S.E.2d 716, 723 (2000) (holding "respondent. . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court").

More particularly, this Court in Hook opted to adopt the professional medical standard of informed consent rather than a lay standard of informed consent. Under the 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," and "the questions of whether and to what extent a physician has a duty to 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." On the other hand, under the lay standard view of informed consent, "the physician's disclosure duty is to be measured by the patient's need for information rather than by the standards of the medical profession," and expert testimony is ordinarily not required. Hook, 281 S.C. at 548-53, 316 S.E.2d at 695-98.

In adopting the professional standard of informed consent, this Court recognized that "the decision as to risk disclosure is a medical question" and the determination as to disclosure involves "medical judgment." Id. at 551-52, 316 S.E.2d at 697 (internal citation omitted). Therefore, a physician's duty to disclose under South Carolina requires the physician to disclose "the material risks inherent in a proposed treatment or procedure." Id. at 553, 316 S.E.2d at 698.

While there is no appellate opinion in South Carolina addressing whether a physician is required to disclose personal issues, whether behavioral or medical, under the language in Hook, it is clear that the Court intended a physician's duty to disclose to only extend to medical risks of the procedure itself. This is especially true where the Hook court described the duty to disclose as a "medical question" involving "medical judgment" which was to be determined under the professional medical standard of informed consent.

A physician's personal issues, including those such as alcoholism, are not required to be disclosed under the doctrine of informed consent as adopted in South Carolina. Personal issues are not medical risks inherent in the proposed procedure. The doctrine of informed consent as adopted by this Court in Hook did not contemplate the expanded duty of disclosure which the Chabeks urge this Court to accept.

Other jurisdictions have also rejected the expansion of the doctrine of informed consent to include a physician's personal issues. The neighboring state of Georgia recognizes the same six elements of the doctrine of informed consent as enumerated by the Hook court, including the third element related to disclosure of materials risks. O.C.G.A § 31–9–6.1(a). In Albany Urology Clinic, P.C. v. Cleveland, 528 S.E.2d 777 (Ga. 2000), the plaintiff sued her surgeon, alleging that he failed to disclose to her his cocaine addiction. The Supreme Court of Georgia, considering whether the surgeon was required to disclose his drug use, held that "absent inquiry by a patient or client, there is neither a common law nor a statutory duty on the part of either physicians or other professionals to disclose to their patients or clients unspecified life factors which might be subjectively considered to adversely affect the professional's performance." Id. at 778. The court expanded upon the problems associated with requiring a surgeon to disclose life factors, noting that there were compelling public policy reasons against doing so, including "the impossibility of defining which of a professional's life factors would be subject to such a disclosure requirement." Id. at 782. The court concluded that a "full and adequate remedy for [the plaintiff's] injuries in

this case is already provided by existing law -- the right to sue [the Defendant] for professional negligence." Id. at 780.[5]

In a similar case, the Superior Court of Pennsylvania considered the question of whether a surgeon was required to disclose that he was not only an alcoholic but also that he was unlicensed. Kaskie v. Wright, 589 A.2d 213 (Pa. Sup.Ct. 1991). Specifically, the court noted, "the question then becomes whether the doctrine of informed consent can be expanded to include information other than that which concerns medical treatment by surgical procedure." Id. at 216. The court's answer was "no," concluding that a surgeon was not required to disclose:

> [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?

Id at 341. The court found that requiring the disclosure of subjective potential factors which could conceivably affect a surgeon's performance is not practical and is not contemplated by the doctrine of informed consent.

In another Pennsylvania case, the Supreme Court of Pennsylvania considered whether a surgeon violated the doctrine of informed consent by misrepresenting his experience related to the particular procedure. Duttry v. Patterson, 771 A.2d 1255 (Pa. 2001). The Court held that "evidence of a physician's personal characteristics and

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[5] The Chabeks argue that Albany Urology should not be considered persuasive authority because Georgia's statute specifically defines the particular medical risks which should be disclosed. As explained above, this Court in Hook deemed the duty to disclose certain risks of a procedure a "medical question" involving "medical judgment." Georgia's statute outlines what types of medical risks should be disclosed. It is clear both states take an approach that only medical risks particular to the procedure itself are subject to disclosure -- not personal life factors of the treating physician.

experience is irrelevant to an informed consent claim." Id. at 1259. Thus, it concluded that the plaintiff's claim for failure to provide informed consent could not proceed. See also Whiteside v. Lukson, 947 P.2d 1263 (Wash. Ct. App. 1997) (holding a physician's duty to disclose is limited to disclosure of treatment-related facts and that "a surgeon's lack of experience in performing a particular surgical procedure is not a material fact for purposes of finding liability predicated on failure to secure an informed consent.").

The above cases are informative and instructive as to what type of materials risks pertaining to a procedure are required to be disclosed under South Carolina's informed consent jurisprudence. The doctrine of informed consent relates to the risks and potential complications related to that procedure, not to "life factors" such as experience, drug abuse, or alcoholism. This comports with the recognition by this Court in Hook that the decision as to risk disclosure is a "medical question" involving "medical judgment."

Expanding the doctrine of informed consent as the Chabeks 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 blood 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.

Accordingly, the Trial Court properly found that the Chabeks' allegations related to Dr. Davidson's failure to disclose his alcohol abuse sought to expand the doctrine of

informed consent beyond reasonable bounds and that Dr. Davidson had no such duty of disclosure. The Trial Court therefore correctly dismissed the claims for failure to provide informed consent.

D. The Trial Court's grant of summary judgment on Mrs. Chabek's informed consent claim should further be affirmed because such claim is merely an additional theory of negligence under a medical malpractice action which is barred by the three-year statute of limitations where she was on notice of a potential claim no later than March 7, 2018 and did not file suit until over three years later on March 12, 2021.

The Trial Court's grant of summary judgment to the Respondents on the informed consent claim is furthermore proper because the three-year statute of limitations also expired on any such alleged claim as well. Any claim based upon the lack of informed consent is not a separate and independent cause of action under South Carolina law but rather falls under the medical malpractice framework where a plaintiff must show through expert testimony that a physician's negligence in rendering medical care proximately caused the patient's injury. Linog v. Yampolsky, 376 S.C. 182, 186-88, 656 S.E.2d 355, 357-59 (2008).

Other jurisdictions have recognized that a surgeon's alcohol addiction at the time he treated the patient, in and of itself, is not an independent basis for a claim for medical malpractice. In Ornelas v. Fry, 727 P.2d 819 (Ct. App. Az. 1986), the Court of Appeals for Arizona evaluated whether a physician's alcohol abuse and DUI could be considered absent evidence that the physician was under the influence of alcohol at the time of the procedure. The court found, "We hold as a matter of law that the fact that [the physician] may have been an alcoholic at the time of the surgery does not create in and of itself a separate issue or claim of negligence. It is only when that alcoholism translates into conduct falling below the applicable standard of care that it has any relevance." Id. at 823. Thus, the court essentially

concluded that there is no separate and distinct cause of action, for informed consent or otherwise, related to a physician's alcohol abuse.

In Williams v. Booker, 712 S.E.2d 617 (Ga. Ct. App. 2011), the Court of Appeals for Georgia concurred with the analysis in Ornelas in rejecting the proposition that a physician's alcoholism at the time of the surgery created an independent claim or issue of negligence or separate claim of medical malpractice. Id. at 620. The court further determined that a physician's "alcohol or drug use or addiction is relevant and admissible only when there is evidence from which the jury may infer that the physician was under the influence of alcohol or drugs at the time of the allegedly negligent treatment." Id.

Therefore, if Mrs. Chabek has any claim based upon Dr. Davidson's alleged use of alcohol which resulted in any purported negligence occurring during her surgery on August 22, 2017, such claim is part and parcel with a medical malpractice claim. It is not a separate and independent claim; it is simply a theory of negligence as to why Mrs. Chabek was allegedly injured during the surgery.

Because Mrs. Chabek was on notice of a potential claim by March 7, 2018, as thoroughly set forth in Section I. of the Argument, the three-year statute of limitations also ran on any theory that alcohol affected Dr. Davidson's performance during the surgery. When she may or may not have discovered the legal theory of informed consent [for which she presented no competent evidence to the Trial Court] is irrelevant to the commencement of the statute of limitations. The lack of knowledge of a legal theory of recovery is of no consequence because the statute of limitations is not tolled until a full-blown theory of recovery is developed. Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994). Rather, statute of limitations begins to accrue when a plaintiff is

alerted to the need for investigation of possible negligence -- not when the plaintiff is able to confirm such negligence. Arant v. Kressler, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997).

In this case, the accrual date was no later than March 7, 2018. The Chabeks had three years from that date to investigate and pursue their claims of negligence against the Respondents. According to the Chabeks' brief, they learned of Dr. Davidson's substance abuse issues by late 2020. Yet they still did not file any action against the Respondents until March 12, 2021 after the three-year statute of limitations had expired. The Trial Court's grant of summary judgment to the Respondents on the lack of informed consent claim should also be affirmed on the additional sustaining ground that the three-year statute of limitations under S.C. CODE ANN. § 15-3-545(A) had expired on any medical malpractice claim arising out of the purported lack of informed consent.

III. The Trial Court properly granted summary judgment on Mrs. Chabek's negligent supervision claim against AnMed because (1) AnMed owed no duty to Mrs. Chabek with respect to Dr. Davidson's alleged substance abuse issues; (2) she failed to present legally competent evidence as to the alleged accrual of the three-year statute of limitations; and (3) the three-year statute of limitations expired where she was on notice of a potential claim no later than March 7, 2018 and did not file suit until over three years later on March 12, 2021.

The negligent supervision claim arising out of AnMed's alleged failure to prevent Dr. Davidson from performing surgeries while dealing with substance abuse issues was also properly dismissed by the Trial Court for three reasons. First, as explained above, there is no duty to the physician to disclose issues with substance abuse. Therefore, there can be no such duty imposed on the hospital or medical practice pertaining to a physician's personal issues such as substance abuse addiction. See Williams v. Booker, 712 S.E.2d 617, 621-22 (Ga. Ct. App. 2011).

Second, Mrs. Chabek submitted no competent evidence in opposition to the motion for summary judgment as to when any such claim allegedly accrued for statute of limitations purposes.

Finally, for the same reasons that the three-year statute of limitations under S.C. CODE ANN. § 15-3-545(A) had run on any alleged informed consent claim, the statute of limitations had also run on any negligent supervision claim. Mrs. Chabek knew by no later than March 7, 2018 that she had a potential claim against AnMed for some injury. That she did not know the specific theory of negligence is irrelevant as to when the statute of limitations began to accrue. Accordingly, by the time the Chabeks filed their medical malpractice action on March 12, 2021, the statute of limitations had expired, and the suit was time barred.

CONCLUSION

For the reasons set forth herein, Respondents AnMed Health and Larry Davidson, MD respectfully request that the Trial Court's grant of summary judgment on all claims asserted by the Chabeks in their medical malpractice action be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondents complies with Rule 211(b), SCACR.

Respectfully submitted,

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