RECEIVED
May 16 2022
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.

REPLY BRIEF

Jay F. Wright
McGowan, Hood & Felder, LLC
135 Edinburgh Court, Suite 202
Greenville, SC 29607
(864) 252-4406
jaywright@mcgowanhood.com

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
jcalloway@mcgowanhood.com

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

Other Jurisdictions

Court Rules

Statutes

REPLY ARGUMENT

1. **Dr. Davidson and AnMed altered their original motion to include a selected excerpt of medical records and actively sought to prevent the Chabeks from pursuing the crucial discovery needed to respond.**

This appeal arises out of an unusual summary judgment motion pursued at an unusual time in an unusual way that is at odds with the language and spirit of Rule 56, SCRCP. The unusual timing and posture made it impossible for the Chabeks to pursue crucial information in discovery before the circuit court ruled. In fact, Dr. Davidson and AnMed actively sought to pause the litigation to prevent discovery while their motions were pending. (R. pp. 162-64). Dr. Davidson and AnMed now argue no discovery was necessary before the circuit court ruled on the accrual date for the Chabeks' claims. (Resp'ts Br. at 23). However, as many courts have recognized, the communications between medical provider and patient are essential evidence for determining when the patient is on notice of a potential legal claim, and there was no opportunity to conduct critical discovery before the Chabeks' claims were dismissed.

Dr. Davidson and AnMed err in arguing that allowing the Chabeks' to conduct discovery would not lead to pertinent evidence on claim accrual. Under South Carolina law, summary judgment may not be considered until the opposing party has "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). A premature summary judgment motion should be denied when the non-movant shows discovery is likely to uncover additional relevant evidence. Id. As discussed below and in Appellants' initial brief (Appellants' Br. at 12), Dr. Davidson and AnMed rely on only a small subset of Ms. Chabek's medical records that are often ambiguous, inconsistent, and incomplete. Dr. Davidson and AnMed now argue the important untapped discovery inquiries the Chabeks have identified (i.e. full medical records and written discovery responses/deposition testimony from Ms.

Chabek's providers) would amount to a fruitless fishing expedition because all relevant evidence for claim accrual lies within the Chabeks' minds. (Resp'ts Br. at 23).

This argument misunderstands the discovery rule's operation. The Chabeks' medical malpractice claim only accrued when "it reasonably ought to have been discovered." S.C. Code Ann. § 15-3-545(A). Ascertaining this crucial moment requires consideration of all relevant "facts and circumstances of [the] injury." McMaster v. Dewitt, 411 S.C. 138, 145, 767 S.E.2d 451, 454 (Ct. App. 2014) (citing Knox v. Greenville Hosp. Sys., 362 S.C. 566, 570, 608 S.E.2d 459, 462 (Ct. App. 2005)). The Court should reject Dr. Davidson and AnMed's suggestion that those "facts and circumstances" do not include specific information on what Ms. Chabek's medical providers said to her about her medical condition obtained through the providers' written discovery responses and deposition testimony. A treating physician's deposition testimony is among the most crucial evidence for determining a claim accrual date when applying the discovery rule. For example, in Fisher v. Pelstring, 817 F. Supp. 2d 791, 807-10 (D.S.C. 2011), the district court denied a limitations-based summary judgment motion after reviewing "deposition testimony by various doctors" as well as the patient's medical records. Fisher found such an evidentiary record was similar to what the South Carolina Supreme Court considered when denying a similar summary judgment motion. Id. at 809 (citing Garner v. Houck, 312 S.C. 481, 484-85, 435 S.E.2d 847, 848-50 (1993)). Thus, the Chabeks should be allowed to learn more information from her medical providers in discovery before a court/jury rules on when the "facts and circumstances" of her medical treatment provided the requisite notice of injury.

Dr. Davidson and AnMed's portrayal of discovery as futile is also belied by their brief. After contending discovery is futile, the brief then turns to a consistent argument that summary judgment was proper because the Chabek's failed to produce evidence to support her proposed

accrual date. (Resp'ts Br. at 24, 28-29, 37). In the space of little over one page, Dr. Davidson and AnMed argue both that "discovery would not lead to information" pertinent to the accrual date and summary judgment was proper because the Chabeks failed to "come forward with specific facts" creating a jury question on the statute of limitations dispute. (Resp'ts Br. at 23-24). The Chabeks did present medical documentation showing a reasonable person would not have been on notice of a medical malpractice claim until August 2018. (R. pp. 67-68, 84-86). But, to the extent that there is any evidentiary gap on this issue, it exists only because the Chabeks' lacked any opportunity to conduct discovery.

In fact, Dr. Davidson and AnMed created a procedural posture for the underlying motion that substantively limited the Chabek's ability to respond. Neither Dr. Davidson nor AnMed initially filed summary judgment motions, choosing instead to file motions to dismiss in May 2021. A motion to dismiss a Notice of Intent to File Suit ("NOI") is recognized by South Carolina law and, like a Rule 12(b)(6), SCRCP motion, should be limited to consideration of the plaintiff's allegations. See Wilkinson v. E. Cooper Cmty. Hosp., Inc., 410 S.C. 163, 169-70, 763 S.E.2d 426, 430 (2014) (applying Rule 12(b)(6), SCRCP standard to motion to dismiss NOI). The Chabeks anticipated opposing the motions to dismiss by reference to the unambiguous allegations of an August 2018 accrual date in their Amended Statement of Facts. (R. p. 91 ¶¶ 23-24). However, less than two weeks before a hearing on their motions to dismiss (held on July 21, 2021), Dr. Davidson and AnMed filed a joint supporting memorandum that also tacked on what was captioned as a motion for summary judgment, claimed as an alternative basis for relief. (R. p. 100).[1]

[1] While this new filing cited Rule 56, SCRCP, there is no precedent for seeking summary judgment on a NOI. Compare Rule 56(b), SCRCP (allowing summary judgment at any time by a party against whom a claim has been "asserted") with S.C. Code Ann. § 15-79-125(A), (E) (stating that medical malpractice claim may not be "initiat[ed]" until pre-suit mediation is complete).

This belated change in the motion's scope and direction left the Chabeks no opportunity—and no time—to conduct discovery. By rule, the Chabeks were precluded from serving written discovery requests at the NOI stage. Rule 33(a), SCRCP (allowing service of interrogatories only with or after service of summons and complaint); Rule 34(a), SCRCP (same for requests for production and inspection). Even if the Chabeks had attempted to serve written discovery on the date Dr. Davidson and AnMed's summary judgment motion was filed, responses would not have been due before the hearing date. Rule 33(a), SCRCP (granting receiving party 30 days to answer or object to interrogatories); Rule 34(b), SCRCP (same for requests for production and inspection).

Moreover, the circumstances in this case show Dr. Davidson and AnMed would not have responded to discovery requests until the circuit court ruled on their motion. While the parties awaited a ruling on Dr. Davidson and AnMed's motions to dismiss/for summary judgment, the parties completed an unsuccessful pre-suit mediation, and the Chabeks filed their summons and complaint. In response, Dr. Davidson and AnMed each filed motions to dismiss. Both argued the complaint was premature because of the pending motion relating to the NOI. (R. pp. 162-64).[2] The aim of these motions was to stop the proceedings from moving from the pleading to discovery stage. See also Santee Portland Cement v. Daniel Int'l Corp., 299 S.C. 269, 271, 384 S.E.2d 693, 694 (1989) ("Plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed").

Finally, using summary judgment at the NOI stage is at odds with the role of summary judgment in the litigation process. Rule 56 shows summary judgment is not intended as a pre-discovery remedy. Rule 56(c), SCRCP specifically contemplates that a court will consider

[2] Notably, both of these motions referred to the proceedings related to the NOI as "a pending motion to dismiss," not a motion for summary judgment. (R. pp. 162-64).

"depositions, answers to interrogatories, and admissions on file" in addition to "pleadings"[3] and affidavits when ruling on summary judgment. The rules do not countenance a defending party seeking summary judgment at a procedural stage so early that the opponent is precluded from even serving discovery requests.

Thus, the circuit court erred in granting Dr. Davidson and AnMed summary judgment based on the statute of limitations because the Chabeks lacked a full and fair opportunity to conduct important discovery on the "facts and circumstances" of Ms. Chabek's medical treatment bearing on the moment when a reasonably prudent person would have notice of a potential medical malpractice claim. Additionally, Dr. Davidson and AnMed's argument that the Chabeks failed to oppose summary judgment with specific facts on claim accrual should be rejected because (1) the motions Dr. Davidson and AnMed originally filed were to be opposed solely with reference to NOI allegations; (2) the Chabeks were precluded by rule from seeking written discovery at the NOI stage of medical malpractice litigation; (3) Dr. Davidson and AnMed's addition of a summary judgment motion left insufficient time to obtain discovery responses; and (4) Dr. Davidson and AnMed's motions to dismiss the Chabeks' complaint were intended to prevent the Chabeks from pursuing discovery.

2. Dr. Davidson and AnMed failed to meet their burden to obtain summary judgment on the Chabeks' medical malpractice claim.

Dr. Davidson and AnMed's summary judgment argument cites just one piece of evidence, provides no context or explanation for its sporadic, medical jargon-filled text, and repeatedly asks the Court to accept the most defense-friendly interpretation for its terse descriptions of Ms.

[3] The circuit court also lacked any "pleadings" to consider for a summary judgment motion as a NOI is not a "pleading." See Rule 7(a), SCRCP (limiting "pleadings" to a complaint, an answer to claim or cross-claim, a reply to counterclaim, a third-party complaint, and a third-party answer).

Chabek's post-operative care. Even if it had been proper to raise a summary judgement motion at the NOI stage before the Chabeks had a chance to pursue discovery, the evidence Dr. Davidson and AnMed presented was still insufficient to support judgment as a matter of law.

By asserting the Chabeks' claims were untimely, Dr. Davidson and AnMed bore the burden of proving all necessary components of a statute of limitations defense including the claim accrual date. Brown v. Finger, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it . . ."). Since claim accrual regularly turns on factual questions when applying the discovery rule, Dr. Davidson and AnMed assumed an even higher burden in seeking summary judgment. To remove these factual issues from a jury's consideration, Dr. Davidson and AnMed must definitively show there are no genuine and material factual disputes over the accrual date. Rule 56(c), SCRCP. That burden is not met simply by pointing to some evidence and offering a defense-friendly interpretation of its meaning. Instead, a summary judgment proponent must show there is no genuine dispute as to the inferences arising from the evidence presented since all such inferences must be drawn in the non-moving party's favor. Young v. S.C. Dep't of Transp., 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999) (citing Staubes v. City of Folly Beach, 331 S.C. 192, 197, 500 S.E.2d 160, 163 (Ct. App. 1998) ("Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied"); Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) (finding that, when ruling on summary judgment related to statute of limitations and discovery rule, a court "must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party").

Dr. Davidson and AnMed offer one piece of evidence in pursuit of summary judgment on the factual question of when an objectively reasonable person in Ms. Chabek's position would

discover her complications were not ordinary post-operative symptoms. This twenty-plus page excerpt of non-sequential medical records lacks any context or corroboration. It also requires a very defense-friendly interpretation to fit Dr. Davidson and AnMed's theory on the accrual date for the Chabeks' claims. Dr. Davidson and AnMed first asks the Court to interpret office notes from October 5, 2017 and November 16, 2017, as an "early indication" of a tortious source for Ms. Chabek's problems. (Resp'ts Br. at 17) (citing R. pp. 135-36). Specifically, Dr. Davidson and AnMed contend that the very fact that an MRI may be ordered in the future would be proof that Ms. Chabek's symptoms could be attributable to a surgical error rather than the ordinary recovery process. (Resp'ts Br. at 17).

Nothing in the cited records compels such a defense-friendly interpretation. The October 5, 2017 office note makes no reference to a possible future MRI and it offered Ms. Chabek an overall encouraging report. Her surgical incision had "healed nicely," her arm and leg strength was "intact," and "no obvious long tact findings [were] noted." (R. p. 135). Ms. Chabek had "mild improvement from the procedure" and her lingering discomfort was attributed to typical post-operative pain. Id. ("we have discussed that she is still fairly early on in the surgical process"). The November 16, 2017 note does mention the possibility of a future MRI but only after documenting that Ms. Chabek's pain and numbness had slightly improved since October. (R. p. 136). Ms. Chabek's providers continued to tell her that "it could take some time for this radicular pain to improve." Far from answering the accrual question in Dr. Davidson and AnMed's favor, a reasonable juror could easily find these records provided no indication of a possible legal claim and only encouraged the Chabeks to attribute Ms. Chabek's continued discomfort to the normal healing process. At the summary judgment stage, the circuit court was required to assume this more plaintiff-friendly interpretation of the disputed records.

Dr. Davidson and AnMed make a similar argument for an office note from January 18, 2018. (Resp'ts Br. at 18). They suggest this record provided "another indication" of a possible legal claim by suggesting possible additional x-rays in the future. Id. (citing R. p. 142). Yet, this record also paints a different picture when considered in full. Ms. Chabek had undergone recent x-rays and an MRI showing "no obvious instability" in her spine. While the MRI revealed a cyst it was "without significant neural compromise" and not a candidate for removal. Moreover, Ms. Chabek's right L4-5 area showed "expected postoperative changes" with "no obvious recurrent disc herniation." Rather than interpreting this record as pointing to possible malpractice, a reasonable juror could read it as an additional reassuring sign that her recovery was progressing just as her medical providers had hoped.

Next, Dr. Davidson and AnMed ask the Court to conclude the March 6, 2018, office note would provide any reasonable person notice of a possible legal claim. (Resp'ts Br. at 18-19). Dr. Davidson and AnMed point to the record's reference to a possible future CT myelography to explore the right L5-S1 facet joint. (R. p. 148). The record then speculated that missing medial facet could mean Ms. Chabek was "dealing with some degree of instability." Id. Dr. Davidson and AnMed never take the additional step of explaining how this information would place an objectively reasonable patient on notice that her problems were not ordinary setbacks in the often-prolonged surgical recovery process. They also fail to account for other portions of the same record designed to allay any possible concerns about Ms. Chabek's condition. The recently completed nerve conduction study had been negative and her flexion and extension films "show[ed] no gross instability." Id. Her L4-5 synovial cyst identified in early visits was described as "unlikely" symptomatic. Id. The physician assistant Ms. Chabek saw that day ultimately concluded that he

would wait another two to three weeks before even "consider[ing] referral" for the CT myelography. Id.

Finally, Dr. Davidson and AnMed ask the Court to interpret their selective set of medical records to show Ms. Chabek's medical providers did not mislead her into believing her symptoms were the product of typical post-operative pain. (Resp'ts Br. at 19, 23-25). A physician's assurance that post-operative pain is a normal part of recovery is a crucial factor that can delay claim accrual by causing the objectively reasonable patient to believe there is no reason to question her physician's surgical performance. See Appellants' Br. at 15 (collecting cases). Dr. Davidson and AnMed admit the records they presented include these sorts of assurances but claim they are limited to the early portion of Ms. Chabek's post-surgery care—i.e. October and November 2017. (Resp'ts Br. at 23-24) (citing R. pp. 135-36). However, even this incomplete record set shows these assurances persisted much later. For example, on January 18, 2018, an office note indicates Ms. Chabek's MRI showed "expected postoperative changes." (R. p. 142).

It is only by ignoring these unfavorable records that Dr. Davidson and AnMed reach their flawed conclusion. (Resp'ts Br. at 19) (arguing Ms. Chabek was on inquiry notice of a possible malpractice claim in February-March 2018 because she had "months of *abnormal* pain") (emphasis added). Deeming Ms. Chabek's pain "abnormal" is an interpretation of the medical records that is at odds with their text. Ms. Chabek would have no reason to understand her pain was "abnormal" when her medical providers consistently described it as a normal part of her recovery. More importantly, by adopting such a defense-friendly interpretation of these records, Dr. Davidson and AnMed disregard the summary judgment standard requiring that the records be interpreted in the light most favorably to the Chabeks.

In sum, it is not enough for Dr. Davidson and AnMed to present an interpretation of these records which, in hindsight, may suggest a legal claim related to the August 2017 surgery. Instead, Dr. Davidson and AnMed were required to show the Chabeks were on inquiry notice of a possible legal claim by March 7, 2018, even when the incomplete medical records offered at the hearing are interpreted in the light most favorable to the Chabeks. Staubes, 331 S.C. at 197, 500 S.E.2d at 163. Dr. Davidson and AnMed fell far short of this standard. These records state nothing suggesting Ms. Chabek's struggles were anything more than normal post-operative complications, and her medical providers repeatedly told Ms. Chabek that she was in the midst of a typical post-operative process. Given the plain text of these records and the strict summary judgment standard, the accrual date for the Chabeks' claims presents genuine disputes of material fact that only a jury can resolve with the benefit of a full record.

3. Any reasonable physician in Dr. Davidson's position would have disclosed his alcoholism and no reasonable patient could discover the resulting informed consent claim until on notice of Dr. Davidson's alcohol issues.

Dr. Davidson and AnMed would have the Court hold that a patient pondering major back surgery has no legal right to know her surgeon is an active alcoholic whose daily drinking he is admittedly unable to control. (R. p. 88 ¶¶ 6-10). Adopting such a narrow view of a physician's disclosure duty would overlook the core objective of South Carolina's informed consent cause of action—i.e. promoting a patient's bodily integrity by assuring her right to make a truly informed choice on the medical risks to which she subjects herself. Hook v. Rothstein, 281 S.C. 541, 547-48, 316 S.E.2d 690, 694-95 (Ct. App. 1984). Like other types of medical errors, South Carolina law relies on expert testimony to identify the surgical risks that are sufficiently material to require disclosure. Here, the only evidence in the record is that a reasonable physician in Dr. Davidson's shoes would have disclosed his alcoholism. (R. p. 168 ¶¶ 2-3, 6).

a. Dr. Davidson's disclosure duty was raised and ruled upon by the circuit court.

Dr. Davidson and AnMed first ask the Court to find the Chabeks' challenge to the dismissal of their informed consent claim to be unpreserved. (Resp'ts Br. at 26-28). An argument or issue is preserved for appellate review so long as it was raised and ruled on by the circuit court. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (citing Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995)). Dr. Davidson's disclosure duty meets this standard. Dr. Davidson and AnMed do not dispute that the issue was ruled on by the circuit court (Resp'ts Br. at 27 (citing R. pp. 17-20)), and the record shows many instances when the Chabeks raised the issue for consideration. The Chabeks' NOI attachment unambiguously alleged Dr. Davidson's legal duty to disclose his alcohol abuse. (R. pp. 92-93 ¶ 29). In their memorandum opposing Dr. Davidson and AnMed's motion, the Chabeks' argued judgment as a matter of law was not proper based on Dr. Davidson's failure to meet his disclosure duty. (R. p. 153). Then, during the motion hearing, the Chabeks again told the circuit court Dr. Davidson had a duty to disclose his alcoholism and that the Chabeks' informed consent claim arising from Dr. Davidson's failure to do so accrued only when his alcohol issues later came to light. (R. p. 73, line 5 – p. 74, line 1). The circuit court even appeared to agree with this argument. (R. p. 74, lines 2-3). Therefore, the issue of Dr. Davidson's disclosure duty was unambiguously raised and ruled on during the circuit court proceedings.

Dr. Davidson and AnMed err in their reliance on In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998). (Resp'ts Br. at 28). Timmerman invoked preservation principles to exclude an argument the appellant wholly "failed to raise" at the lower court. 331 S.C. at 460, 502 S.E.2d at 922. Here, the Chabeks unambiguously raised Dr. Davidson's disclosure duty in multiple circuit court filings. Similarly, Timmerman found that the lower court entered its disputed

ruling "[w]ithout hearing any arguments" on the disputed issue. Here, the Chabeks' attorney specifically argued Dr. Davidson's disclosure duty during the July 21, 2021 hearing. (R. p. 73, line 5 – p. 74, line 1). Dr. Davidson and AnMed further err in arguing a post-order motion was required to preserve the issue. The South Carolina Supreme Court has held that a Rule 59(e), SCRCP motion is required only when an issue has been raised but not ruled upon. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). That scenario does not apply here as the citations above show Dr. Davidson's disclosure duty was raised, and Dr. Davidson and AnMed do not dispute that the issue was ruled on in the circuit court's order.

b. A surgeon's duty to disclose active alcoholism is consistent with South Carolina law and bounded by the same expert requirements applied to other medical errors.

On the merits, the circuit court erred in dismissing the Chabeks' informed consent claim because important principles of South Carolina law support disclosure of crucial information by a surgeon to his patient. Moreover, Dr. Davidson and AnMed's analysis of persuasive authority ignores the most similar case and raises a policy concern that is easily resolved using the same evidentiary principles applied to claims for other types of medical errors.

First, the Court should reject Dr. Davidson and AnMed's suggestion that South Carolina law supports restricting a physician's disclosure duty to the physical risks of the procedure itself. As their brief acknowledges, South Carolina has not directly addressed this issue. (Resp'ts Br. at 30). Still, the state's appellate courts have spoken in broad terms in describing a physician's duty to convey important information to patients and plainly stated the public policy which makes the informed consent claim such an important tort remedy. Hardee v. Bio-Medical Applications of S.C., Inc., 370 S.C. 511, 516, 636 S.E.2d 629, 631-32 (2006) (describing a physician's broad duty to warn of "the dangers associated with medical treatment" including all the "attendant risks and

affects"); 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") These important principles would not be served by condoning a physician's choice to conceal the risk that his surgical performance may be impaired by alcohol impairment. See State Bd. of Med. Examiners v. Fenwick Hall, Inc., 308 S.C. 477, 480, 419 S.E.2d 222, 224 (1992) ("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").

Dr. Davidson and AnMed argue this Court's precedent counsels against Dr. Davidson's duty to disclose his alcoholism. (Resp'ts Br. at 29-31, 33) (citing Hook). While Hook chose the "professional standard" over its "lay" counterpart for defining a surgeon's disclosure duty, that does not mean the duty is limited to physical risks of the surgery itself. 281 S.C. at 553, 316 S.E.2d at 698. Instead, the professional standard simply requires that a surgeon disclose all "risks which a reasonable medical practitioner of like training would disclose under the same or similar circumstances." Id. at 548, 316 S.E.2d at 695 (citations omitted). Here, the Chabeks presented Dr. Davne's affidavit to show a reasonable surgeon in Dr. Davidson's position would have disclosed his alcohol abuse. (R. p. 168 ¶¶ 2-3, 6). In light of this uncontradicted expert opinion, summary judgment should have been denied.

Second, Dr. Davidson and AnMed present an incomplete and flawed analysis of persuasive authority. Their brief does not address Hidding v. Williams, 578 So.2d 1192 (La. App. 1991), where the court found a surgeon had a duty to disclose his alcoholism before performing spinal surgery on his patient. See Appellants' Br. at 19-20. Instead, Dr. Davidson and AnMed rely on less factually analogous cases most of which raise one flawed policy-based argument for strictly limiting a physician's disclosure duty. (Resp'ts Br. at 31-33). These courts were generally concerned that recognizing a physician's responsibility for disclosing material risks related to his

capacity or sobriety would create a legal duty for which physicians could not predict or plan. E.g. Albany Urology Clinic, P.C. v. Cleveland, 528 S.E.2d 777, 778 (Ga. 2000); Kaskie v. Wright, 589 A.2d 213, 217 (Pa. Super. Ct. 1991) (worrying that limits of disclosure duty would not be "easily definable"). Dr. Davidson and AnMed build their argument around this premise, claiming that recognizing Dr. Davidson's duty to disclose his alcoholism to Ms. Chabek would "open[] a never-ending Pandora's box." (Resp'ts Br. at 33).

However, recognizing this duty would not make South Carolina's informed consent doctrine unwieldy. As the South Carolina Supreme Court held in Hook, the parameters of a physician's duty are defined by the reasonable physician standard proved to a factfinder through expert testimony. 281 S.C. at 548-49, 316 S.E.2d at 695. That is precisely the same standard applied to claims against physicians based on a prescribing error, misdiagnosis, or any other type of medical malpractice case. See e.g. Doe v. Am. Red Cross Blood Servs., 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989) (describing professional standard of care as "fail[ure] to conform to the generally recognized and accepted practices in [the] profession"); Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014) (holding that expert testimony is used to define a medical provider's standard of care and alleged breach of the standard). Dr. Davidson was required to disclose his alcoholism to Ms. Chabek because a reasonable spinal surgeon in his position would have done so just as he was required to sterilize his hands before surgery because that is what a reasonable surgeon would do before operating.

South Carolina law does not demand an itemized list of "dos" and "don'ts" to define a physician's professional obligations under the theory that anything less lacks limits or predictability for practitioners. Hook imposed the same analytical framework for the disclosure duty underlying an informed consent claim that has been used for decades in defining the duty

underlying traditional medical malpractice claims. 281 S.C. at 551, 316 S.E.2d at 696-97. Thus, the Court should reject Dr. Davidson and AnMed's contention that the Chabeks' expert-supported informed consent claim threatens to lead South Carolina law on physician duties to an unpredictable or unsustainable place. The Chabeks' claim is consistent with South Carolina informed consent principles, reinforced by the most apt persuasive authority, and supported by an uncontroverted expert opinion.

c. The Chabeks could not have discovered their informed consent claim until they learned of the alcoholism Dr. Davidson failed to disclose.

Dr. Davidson and AnMed then argue the Chabeks' informed consent claim was untimely because it is "part and parcel" with their medical malpractice claim based on Dr. Davidson's surgical errors such that the informed consent and surgical error claims accrued at the same time. (Resp'ts Br. at 34-36). This argument should be rejected for multiple reasons.

First, the March 7, 2018 accrual date Dr. Davidson and AnMed propose for the malpractice claim is not supported by the medical records as discussed above. Moreover, granting summary judgment based on this proposed accrual date was improper because the Chabeks were not permitted to conduct pertinent discovery on the issue. Second, Dr. Davidson and AnMed incorrectly conclude the Chabeks' informed consent and surgical error causes of action present an indistinguishable claim. Admittedly, South Carolina law states that an informed consent claim is "no different from any other action for professional malpractice" in one sense. Hook, 281 S.C. at 551, 316 S.E.2d at 696. But, this quote simply means that, like a traditional medical malpractice claim, a lack of informed consent claim requires evidence to establish the standard of care and breach of duty. Id. at 551, 316 S.E.2d at 696-97.

Dr. Davidson and AnMed construe this language in Hook to mean informed consent and malpractice claims based on surgical errors are wholly indistinguishable with claim accrual for the

former collapsing into the later. Neither Hook nor any other South Carolina precedent have so held. More importantly, the proposition is inconsistent with core principles governing statutes of limitations. While a legal claim generally accrues as soon as the injured party "has a legal right to sue on it," the discovery rule that applies here delays accrual to the moment when the claimant knew or should have known "of the alleged wrongful acts." Jones v. City of Folly Beach, 326 S.C. 360, 368, 483 S.E.2d 770, 774 (Ct. App. 1997). The "wrongful act" underlying the Chabeks' informed consent claim was Dr. Davidson's failure to disclose his active alcoholism when Ms. Chabek was asked to consent to surgery. The Chabeks did not know and could not have known of this wrongful act until Dr. Davidson's alcoholism came to light in 2020. (Hearing Tr. 19:19-21; 20:17; Pla. Mem. in Opp. to Mot. to Dismiss at 5). Dr. Davidson and AnMed point to no evidence to show how the Chabeks were on inquiry notice of an informed consent claim by March 7, 2018.

Persuasive authority further rejects the notion that claims based on surgical errors and informed consent violations must accrue simultaneously. These two claims often accrue at different times because "they typically require knowledge of different facts." Gaston v. Parsons, 864 P.2d 1319, 1325 (Or. 1994). They also protect different patient interests. A traditional malpractice claim furthers the patient's interest in a physician displaying technical competence in performing her procedure, while an informed consent claim focuses on the patient's interest in maintaining bodily integrity through a truly informed decision to proceed before the operation begins. Harvey v. Strickland, 350 S.C. 303, 310, 566 S.E.2d 529, 533 (2002) (citing In re Duran, 769 A.2d 497 (Pa. Super. 2001)). Thus, while the two claims may be similar in the standard of care and breach requirements, "[f]or the purpose of the statute of limitations, an informed consent claim is not the same as a negligent surgery claim." Gaston, 864 P.2d at 1326. An informed consent claim only accrues when the plaintiff either knows or should know of the risk her physician failed

to disclose. See Levenson v. Souser, 557 A.2d 1081, 1088 (Pa. Super. 1989) ("the statute of limitations applicable to a lack of informed consent action cannot begin to run until plaintiff did or reasonably could have discovered that the medical procedure performed has caused an injury of which the plaintiff was not warned"). Here, the Chabeks' informed consent claim accrued in 2020 when they finally received notice that Dr. Davidson was suffering from active alcoholism at the time of her August 2017 surgery.

4. Dr. Davidson and AnMed's argument misconstrues the Chabeks' negligent supervision claim.

Finally, Dr. Davidson and AnMed argue the Chabeks' negligent supervision claim should fail because Dr. Davidson had no duty to disclose his alcoholism. (Resp'ts Br. at 36). As discussed in Argument 3(b) above, Dr. Davidson did have a duty to disclose his condition. Plus, negligent supervision covers far more than failure to disclose important information. A negligent supervision claim may be asserted "[i]n circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public." Beneficial Financial I, Inc. v. Windham, 431 S.C. 256, 277-78, 847 S.E.2d 793, 805 (Ct. App. 2020) (quoting James v. Kelly Trucking Co., 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008). Dr. Davidson and AnMed rely on Williams v. Booker, 712 S.E.2d 617, 621-22 (Ga. App. 2011), where the only alleged failure to supervise was in a hospital's failure to inform their physician's patient of the physician's substance abuse issues. Here, however, Ms. Chabek alleges more than just failure to inform. AnMed Health had a duty to "properly supervise" its employee by "prevent[ing] Dr. Davidson from continuing to perform surgeries" in light of his known alcohol impairments. (R. p. 90 ¶ 17(c)). Therefore, the circuit court erred in dismissing the Chabeks' negligent supervision claim.

CONCLUSION

Based on the arguments stated above and those in their initial brief, the Chabeks respectfully request the Court reverse the circuit court's award of summary judgment on all torts identified in the Chabeks' NOI and attached Amended Statement of Facts.

Respectfully submitted,

/s/ Jordan C. Calloway
Jay F. Wright
McGowan, Hood & Felder, LLC
135 Edinburgh Court, Suite 202
Greenville, SC 29607
(864) 252-4406
jaywright@mcgowanhood.com

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
jcalloway@mcgowanhood.com

Attorneys for Appellants

Rock Hill, SC
May 16, 2022

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.

Respectfully submitted,

/s/ Jordan C. Calloway
Jay F. Wright
McGowan, Hood & Felder, LLC
135 Edinburgh Court, Suite 202
Greenville, SC 29607
(864) 252-4406
jaywright@mcgowanhood.com

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
jcalloway@mcgowanhood.com

Attorneys for Appellants

May 16, 2022
Rock Hill, SC