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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS
THE HONORABLE R. LAWTON McINTOSH
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2024-000413

Opinion No. 6039 (S.C. Ct. App. December 13, 2023)

Anita and James Chabek,

PETITIONERS,

versus

AnMed Health and Larry Davidson, MD,

RESPONDENTS.

RETURN OF RESPONDENTS ANMED HEALTH AND LARRY DAVIDSON, MD TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals correctly hold that the parameters of South Carolina's informed consent doctrine only require a physician to disclose procedure-specific risks and not the physician's personal, medical, and behavioral issues such alcohol consumption on the physician's personal time outside of work hours?

INTRODUCTION

The law governing informed consent and guiding physicians practicing in South Carolina as to their duties of disclosure to patients has been in place since the Court of Appeals' decision in Hook v. Rothstein, 281 S.C. 541, 316 S.E.2d 690 (Ct. App. 1984), which this Court agreed was correctly decided. 283 S.C. 64, 320 S.E.2d 35 (1984). Hook established that a physician who performs a diagnostic, therapeutic, or surgical procedure has a duty to disclose to a patient, in absence of an emergency, the following: (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.

Central to this appeal is the scope of a physician's duty under South Carolina's informed consent doctrine to inform a patient of the material risks specific to and inherent in a proposed procedure or treatment. The Chabeks seek to expand this duty of disclosure far beyond the procedure-specific parameter long-established by this State's appellate courts. In this appeal, the Chabeks urge this Court to require physicians to disclose information extraneous to the procedure itself, including a physician's personal life factors, and in this case, specifically a physician's alcohol consumption.

The Court of Appeals issued a well-reasoned opinion rejecting the Chabeks' position and holding that the State's informed consent doctrine is procedure-specific and requires only disclosure of materials risks involved in the procedure itself. See Opinion No. 6039 filed Dec. 13, 2023, pp. 10-12. The Court of Appeals further determined that based upon the defined boundaries of the informed consent doctrine as established in case precedent, "[t]he personal life factors of the physician performing the procedure are not inherent to the procedure and are not contemplated by Hook or its progeny" and thus are not required to be disclosed by a physician. Id. at p. 12.

The decision of the Court of Appeals correctly analyzes and rejects the Chabeks' argument that a physician's personal life factors should be disclosed under the unambiguous elements of this State's informed consent doctrine; therefore, review by this Court is not necessitated under Rule 242(b), SCACR. Accordingly, this Court should deny the Petition.

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. Petitioners Anita and James Chabek contend that Mrs. Chabek experienced complications following the procedure as a result of Dr. Davidson's alleged negligence.

On August 10, 2017, Mrs. 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.] 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.]

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

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.]

Mrs. Chabek underwent surgery on August 22, 2017, including resection of a right-sided L5/S1 synovial cyst. [R.pp. 88, ¶ 5; 127-128.] Thereafter, Mrs. Chabek complained for several months of continued pain following the surgery. [R.pp. 130-149.]

More than three years after the surgery, the Chabeks filed their Notice of Intent to File Suit against AnMed and Dr. Davidson on March 12, 2021 in the Court of Common Pleas for Anderson County, with an Amended Statement of Facts subsequently filed on June 8, 2021. [R.pp. 24-39; 87-97.] Alleging that Dr. Davidson negligently performed the surgery, the Chabeks asserted

causes of action for (1) medical negligence; (2) lack of informed consent; (3) negligent supervision; and (4) general negligence. [R.pp. 46, ¶ 25 – 51, ¶ 48; 91, ¶ 25 – 96, ¶ 48.]

Among their allegations, the Chabeks contended Dr. Davidson was an alcoholic who had a relapse and started drinking alcohol again sometime in early 2016. [R.pp. 43, ¶ 6; 88, ¶ 6.] The Chabeks further alleged that Dr. Davidson continued to drink alcohol in 2017 and that his frequency of drinking increased over time. [R.pp. 43, ¶ 7; 88, ¶ 7.] They went on to allege that in October 2017, after Mrs. Chabek's August 22, 2017 surgery, the frequency of Dr. Davidson's drinking progressed to the point he was drinking every day that he was not on call and that he was eventually arrested for DUI in December 2017. [R.pp. 43, ¶¶ 8, 11; 88, ¶¶ 8, 11.]

Notably, the Chabeks did not allege that Dr. Davidson was drinking the day of Mrs. Chabek's August 22, 2017 surgery or was impaired the day of her surgery. Nevertheless, the Chabeks contend that AnMed and Dr. Davidson had a duty to disclose Dr. Davidson's alcohol consumption under the informed consent doctrine.

Thereafter, AnMed and Dr. Davidson sought dismissal or, in the alternative, summary judgment on the Chabeks' claims. [R.pp. 98; 99; 100-149.] A hearing was held before The Honorable R. Lawton McIntosh on July 21, 2021. [R.pp. 55-82.] After the hearing, on August 2, 2021, the Chabeks filed their Complaint after the required pre-suit mediation ended in an impasse.[1] [R.pp. 40-54.]

[1] This 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).

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.] Defense counsel e-mailed a proposed order granting summary judgment to the Trial Court and opposing counsel on September 17, 2021. [R.p. 174.]

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.] 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.] The Trial Court denied the motion for reconsideration in a Form 4 Order filed September 27, 2021, and the Chabeks filed and served their Notice of Appeal with the Court of Appeals on or about October 4, 2021. [R.pp. 4-6.] The Trial Court subsequently issued the formal order[2] 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 alcohol consumption because there was no duty of Dr. Davidson to disclose his personal issues under South Carolina law. [R.pp. 7-23.]

[2] 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." 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).

On December 13, 2023, the Court of Appeals issued its opinion affirming in part, reversing in part, and remanding for further proceedings. Opinion No. 6039 filed Dec. 13, 2023. First, the Court of Appeals reversed the Trial Court's finding that the medical negligence claim was barred by the statute of limitations and remanded for further proceedings. Id. at pp. 8-10. The Court of Appeals also reversed the Trial Court's grant of summary judgment on the negligent misrepresentation claim, concluding that the statute of limitations had not expired on any such claim as well. Id. at pp. 12-13. Lastly, the Court of Appeals affirmed the Trial Court's grant of summary judgment on the Chabeks' informed consent cause of action because South Carolina's informed consent doctrine does not require a physician to disclose personal life factors. Id. at pp. 10-12.

The Chabeks filed a Petition for Rehearing with the Court of Appeals on December 28, 2023 challenging the Court of Appeals' holding as to informed consent, which was denied on February 14, 2024. The Chabeks have now filed a Petition for Writ of Certiorari with this Court seeking review of the Court of Appeals' decision as to the informed consent doctrine.

ARGUMENT

The Court of Appeals correctly held that the parameters of South Carolina's informed consent doctrine only require a physician to disclose procedure-specific risks and not the physician's personal, medical, and behavioral issues such as alcohol consumption on the physician's personal time outside of work hours.

The Court of Appeals correctly held that Mrs. Chabek could not maintain a claim for lack of informed consent against AnMed and Dr. Davidson for the nondisclosure of Dr. Davidson's consumption of alcohol outside of his work hours. In Hook v. Rothstein, 281 S.C. 541, 316 S.E.2d 690 (Ct. App. 1984), the Court of Appeals adopted the doctrine of informed consent and set forth six

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

More particularly, in recognizing the doctrine of informed consent, the Court of Appeals 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, the Court of Appeals 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). The Court of Appeals recognized in Hook that expert testimony is usually necessary to establish the medical question of risk disclosure. Further expounding upon the types of risks that should be disclosed and

how materiality of such risks should be determined, the Hook court approvingly cited the following observations from the Missouri Supreme Court in Aiken v. Clary:

> The question is not what, regarding the risk involved, the *juror* would relate to the patient under the same or similar circumstances, or even what a reasonable *man* would relate, but what a reasonable *medical practitioner* would do. Such practitioner would consider the state of the patient's health, the condition of his heart and nervous system, his mental state, and would take into account, among other things, whether the risks involved were mere remote possibilities or something which occurred with some sort of frequency or regularity. *This determination involves medical judgment* as to whether disclosure of possible risks may have such an adverse effect on the patient as to jeopardize success of the proposed therapy, no matter how expertly performed.... After a consideration of these and other proper factors, a reasonable medical practitioner, under some circumstances, would make full disclosure of all risks which had any reasonable likelihood of occurring, but in others the facts and circumstances would dictate a guarded or limited disclosure. In some cases the judgment would be less difficult than in others, but, *in any event, it would be a medical judgment.* [Some emphasis added.]

396 S.W.2d 668, 674–75 (Mo. 1965).

The doctrine of informed consent as adopted in South Carolina is premised upon the need for a physician to disclose potential complications and risks to a patient from a certain procedure or treatment that might occur despite the absence of any negligence. Should a complication arise from a procedure or treatment which was not disclosed prior to the patient, liability under the doctrine of informed consent may attach even without any negligence on the part of the physician and even if the procedure was correctly performed. Thus, under the doctrine of informed consent in South Carolina, a physician may be liable if the plaintiff proves that an "undisclosed risk materialized and caused him or her injury and that had the plaintiff been informed he or she would not have submitted to the procedure or treatment." Hook, 281 S.C. at 564, 316 S.E.2d at 704; see also Faile v. Bycura, 297 S.C. 58, 61, 374 S.E.2d 687, 688-89 (Ct. App. 1988) (noting patient had not alleged an informed

consent claim where she had not cited a complication or risk that she claimed was not disclosed to her prior to the procedure).

Within this framework and purpose of informed consent in South Carolina, the Court of Appeals in Hook concluded that a physician's duty to disclose requires the physician to inform the patient of "the material risks inherent in a proposed treatment or procedure." Hook, 281 S.C. at 553, 316 S.E.2d at 698 (emphasis added). In determining what risks inherent in a proposed treatment or procedure must be disclosed, the "scope of a physician's duty to disclose is measured by those communications a reasonable medical practitioner in the same branch of medicine would make under the same or similar circumstances." Id. (emphasis added).. The qualification that materiality of risks must be measured by a physician in the same branch of medicine is significant because procedures and treatments in different areas of medicine may have unique and particular risks and complications. Given that such procedures and treatments pose differing risks, the Court of Appeals in Hook further emphasized that the materiality of such risks inherent in a particular procedure or treatment must ordinarily be established by expert medical evidence. Id.

The Chabeks argue that the application of South Carolina's informed consent doctrine to a physician's personal factors is a novel issue not capable of resolution under current precedent. In its opinion, the Court of Appeals disagreed and concluded that the State's "current precedent on the informed consent doctrine sufficiently addresses the issue in this case . . . ." See Opinion No. 6039 filed Dec. 13, 2023, p. 12. The Hook opinion, which this Court confirmed was correctly decided, 283 S.C. 64, 320 S.E.2d 35 (1984), explicitly only required disclosure of material risks involved in and inherent to the proposed procedure or treatment. The Hook decision extended a physician's duty to disclose to only those medical risks of the procedure itself. This holding is supported by the

Hook court's description of the duty to disclose as a "medical question" involving "medical judgment" which is to be determined under the professional medical standard of informed consent and by what a reasonable physician in the same branch of medicine would disclose. Hook, 281 S.C. at 552-53, 564,, 316 S.E.2d at 697-98, 703.

A physician's personal issues, including those such as a physician's alcohol consumption, are not required to be disclosed under the doctrine of informed consent as adopted in South Carolina. Physician-specific personal issues are not medical risks and complications inherent in a proposed procedure or treatment. The doctrine of informed consent as adopted 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 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 Georgia Supreme Court expounded 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.[3]

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

[3] The Chabeks have argued 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, the Hook court 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.

of a physician's personal characteristics and experience is irrelevant to an informed consent claim" because an informed consent claim focuses on "information relative only to the surgery itself." Id. at 1259. Thus, it concluded that the plaintiff's claim for failure to provide informed consent could not proceed.

In Whiteside v. Lukson, 947 P.2d 1263, 1265 (Wash. Ct. App. 1997), the Washington Court of Appeals likewise held that a physician's duty to disclose is limited to disclosure of treatment-related facts. It concluded "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 court theorized that if the doctrine of informed consent was expanded beyond treatment-related facts, "the physician's own health, financial situation, even medical school grades, could be considered material facts a patient would want to consider in consenting to treatment by that physician." Id. The court rejected an expansive approach to the doctrine of informed consent that would be based upon the disclosure of unlimited and arbitrary factors.

The above cases are informative as to what types of materials risks pertaining to and inherent in a procedure or treatment are required to be disclosed and what types of factors are not required to be disclosed. The doctrine of informed consent as adopted in the above states and in South Carolina relates to the risks and potential complications germane to that procedure or treatment, not to "life factors" such as experience, drug abuse, or alcohol use. This comports with the recognition by the Hook court that risk disclosure is a "medical question" involving "medical judgment." In this case, the Court of Appeals properly analyzed and applied the holding in Hook to the question raised by the Chabeks as to whether the duty to disclose extends to physician-specific personal factors.

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? Perhaps the surgeon had a lack of quality sleep the night before a procedure. Should that also be disclosed? Certainly, such subjective and difficult to delineate matters are not what our appellate courts contemplated when recognizing the doctrine of informed consent. Instead, the Court of Appeals in Hook, as approved of by this Court, laid out six very specific elements of informed consent. The disclosure of a physician's life factors are not one of those elements.

Accordingly, the Court of Appeals properly concluded that the Chabeks' allegations that AnMed and Dr. Davidson should have disclosed Dr. Davidson's alcohol use sought to improperly broaden the doctrine of informed consent beyond reasonable bounds and that AnMed and Dr. Davidson had no such duty of disclosure. The Court of Appeals therefore correctly affirmed the Trial Court's dismissal of the claims for failure to provide informed consent.

The Chabeks challenge the Court of Appeals' opinion for several reasons, but none of their contentions warrant review of the Court of Appeals' thoroughly considered holding.

A. Case law from other jurisdictions is non-persuasive and distinguishable.

First, the Chabeks point to the holdings from a few states which have recognized some physician personal factors as subject to disclosure. Yet, the Chabeks do not acknowledge the underlying policy differences and standards adopted by such states, including the adoption of the lay standard of informed consent versus the professional standard employed in South Carolina. See Hidding v. Williams, 578 So. 2d 1192, 1194-95 (La. Ct. App. 1991) (analyzing Louisiana's informed

consent doctrine under the lay standard measured by a patient's need for information; in addition, the elements of informed consent recognized by the Louisiana Court of Appeals require a physician to disclose "the existence of a material risk unknown to the patient" which is not qualified by risks involved in the procedure as in South Carolina)[4]; see also Moore v. Regents of Univ. of California, 793 P.2d 479, 483 (Cal. 1990) (adoption of lay standard or patient's need for information); Andersen v. Khanna, 913 N.W.2d 526, 536, 538 (Iowa 2018) (adoption of lay standard); Goldberg v. Boone, 912 A.2d 698, 714-15 (Md. Ct. App. 2006) (adoption of lay or patient need for information standard); Johnson by Adler v. Kokemoor, 545 N.W.2d 495, 501-02 (Wis. 1996) (adoption of lay or prudent patient standard)[5].

Additional cases cited by the Chabeks required a physician's disclosure because of a physical

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[4] In its *Amicus Curiae* Brief to the Court of Appeals filed on August 31, 2023, the American Medical Association and the South Caroline Medical Association pointed out that the impact of the holding in Hidding now remains unclear in Louisiana. The Hidding opinion involved a surgery that took place in 1984 and was based upon the state's then in effect informed consent statute, LSA-R.S. 40:1299:40 (repealed by *Acts 2012, No. 759, §3*, eff. 6/12/2012). The surgery also predated a 1990 Amendment creating "The Louisiana Medical Disclosure Panel" which was created specifically to "determine which risks and hazards related to medical care and surgical procedures must be disclosed by a physician or other health care provider to a patient or person authorized to consent for a patient" by La. Acts 1990, No. 1093 and provides a third way for physicians to obtain informed consent via provisions of lists prepared by the panel. LA Rev Stat § 40:1157.2(B)(1) (2015).

[5] In a subsequent opinion, the Court of Appeals for Wisconsin, in holding that a physician had no duty under Wisconsin's informed consent law to disclose his alcohol and drug problems, found that the doctrine of informed consent had not been expanded so broadly to include physician-specific factors. See Mau v. Wisconsin Patients Compensation Fund, 668 N.W.2d 562 (Wis. Ct. App. 2003). In reaching its holding, the court noted that the plaintiff had read the Johnson case too broadly. Johnson had addressed whether a doctor must inform a patient about his experience and expertise relating to a specific surgical procedure when asked by the patient for that information. Johnson, 545 N.W.2d at 505. The Johnson opinion, as interpreted by the court in Mau, did not require the disclosure of personal information about a physician that had no relevance to a particular course of treatment.

impairment afflicting the physician which created a material risk in the procedure itself. See Hawk v. Chattanooga Orthopaedic Grp., P.C., 45 S.W.3d 24, 33-34 (Tenn. Ct. App. 2000) (disclosure of surgeon's disabling hand condition which affected the surgeon's use of his hands and raised risk of surgeon's ability to correctly perform surgery; surgeon acknowledged issues with his fingers during surgery); Faya v. Almaraz, 620 A.2d 327 (Md. Ct. App. 1993) (disclosure that surgeon was infected with the AIDS virus when there was a possibility of transmission of the virus to the patient); Est. of Behringer v. Med. Ctr. at Princeton, 592 A.2d 1251 (N.J. Super. 1991) (disclosure of AIDS-positive surgeon and risk of transmission).

It is of notable importance that the Chabeks did not allege that any alcohol consumption by Dr. Davidson on his own personal time caused any impairment on the day of surgery. In fact, the Chabeks alleged that Dr. Davidson's frequency of alcohol use to every day that he was not on call did not even occur until after Mrs. Chabek's surgery. **[**R.pp. 43, ¶ 8,; 88, ¶ 8.] The allegations in this case are in contrast to the immediately above cited cases where a physician's impairment had a direct impact on the procedure itself. Even so, South Carolina's informed consent law nevertheless does not require the disclosure of physician-specific factors. Instead, as discussed further herein, see supra pp. 20-22, a physician's negligence in performing a procedure because of an impaired physical condition is not a matter concerning informed consent of the patient, but rather of malpractice by the physician for which the patient can seek redress.

B. The South Carolina appellate courts have not previously recognized disclosure of non-procedure related risks.

The Chabeks additionally argue that the Court of Appeals' holding in this case is not consistent with this Court's precedent and that this Court has previously recognized a duty to disclose

factors beyond those not specific to or inherent in a procedure or treatment. In making such a claim, the Chabeks point to this Court's decision in Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002).

Harvey involved a patient who was a Jehovah's Witness who received an unwanted blood transfusion after an elective surgery. Based upon his religious beliefs, the patient signed forms prior to the surgery which indicated he refused to have blood or blood products given to him. Two days after surgery, the patient developed complications, and the physician recommended to the patient's mother that the patient needed a blood transfusion. The patient's mother consented to the transfusion. The patient sued for the unwanted medical treatment, and this Court agreed he could maintain claims for the unwanted treatment. Id. at 306-08, 555 S.E.3d at 531-32.

The Harvey case did not involve the question of what types of information or risks are required to be disclosed under the informed consent doctrine, but rather involved liability for unwanted medical treatment where the patient had not given any consent to the treatment and expressly rejected such treatment. The Harvey case arose out of the principle that an individual should not be forced to submit to medical treatment against the individual's will. See Union Pac. R. Co. v. Botsford, 141 U.S. 250 (1891) (holding plaintiff in legal proceeding cannot be required to submit to a surgical examination as to the extent of the injury sued for); Schloendorff v. Soc'y of New York Hosp., 105 N.E. 92 (N.Y. 1914), abrogated on other grounds by Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (1957) (observing surgeons performed operation on plaintiff while she was unconscious which she had expressly forbidden).

This case does not involve a procedure forced upon a patient as in Harvey. Instead, the question is what types of complications and risks must be disclosed to a patient who elects to

undergo a certain procedure. The Hook case answers that question – that material risks inherent in the procedure itself must be disclosed – and the Harvey case does not alter the requirements set forth in Hook.

Similarly, the Chabeks' reliance upon Hardee v. Bio-Med. Applications of S.C., Inc., 370 S.C. 511, 636 S.E.2d 629 (2006), also does not change the long-standing principles established in Hook. Indeed, Hardee reaffirms Hook's holding that a physician must disclose material risks inherent in the procedure to a patient considering a treatment.

Hardee specifically addressed whether a medical provider owes a duty to third-party non-patients to warn a patient of the risks and effects of a treatment before administering the treatment when the medical provider knows that the treatment may have detrimental effects on a patient's capacities and abilities which could harm third parties Id. at 516, 636 S.E.2d at 631-32. This Court determined in Hardee that a dialysis center could owe a duty to third-party motorists who were injured by a dialysis patient who lost control of his vehicle if the dialysis center knew that the patient would experience ill effects after treatment affecting the patient's ability to drive. Id.

In reaching this conclusion, this Court confirmed that "a medical provider has a duty to warn of the dangers associated with medical treatment" and must also "warn a patient of the attendant risks and effects of any treatment." Id. at 516, 636 S.E.2d at 631-32. The court's statements referred to those complications which can arise from a procedure and potentially result in negative consequences to the patient. The Hardee court did not augment a physician's duty to disclose to include factors extraneous to the procedure itself as the Chabeks suggest.

The Court of Appeals' opinion in this case as to the scope of the duty to disclose under the doctrine of informed consent did not conflict with this Court's holdings in Harvey and Hardee.

Rather, the Court of Appeals' opinion adhered to long-standing principles as established in Hook and further endorsed by this Court in Hardee. Accordingly, the Court of Appeals' opinion does not merit review by this Court.

C. The Court of Appeals' opinion upholds the policies behind the doctrine of informed consent adopted in South Carolina.

With the legal principles against them, the Chabeks lastly attempt to argue that the Court of Appeals' opinion results in negative policy implications. To the contrary, the Court of Appeals' opinion in this case reaffirms the guiding law for physicians in South Carolina and achieves consistency in the application of the law of informed consent.

The Chabeks first wrongly suggest that the Court of Appeals' opinion exceeds judicial boundaries and limits the role of expert testimony. Quite opposite, the Court of Appeals, consistent with prior case law, properly delineated the legal parameters of physician disclosure. Expert testimony must fall within the confines of established legal boundaries. Experts cannot simply create new duties beyond the parameters set by law. Otherwise, if left unconstrained, experts could create ever expanding duties, leading to chaos in the uniformity of the legal principles governing disclosure by physicians.

The Court of Appeals also correctly applied the tenets of Hook and held that the risks to be disclosed under the informed consent doctrine in South Carolina must be involved in the procedure itself. The Chabeks challenge this boundary as unworkable, but the boundary recognized by the Court of Appeals, as previously established in case precedent, comports with the purpose of informed consent. The objective of informed consent is to ensure that the patient understands the risks, benefits, and alternatives of a proposed procedure or treatment. The patient should be made

aware of those complications or negative outcomes that can arise from a particular procedure or treatment even if the procedure or treatment is performed properly. Consent means that the patient has determined that despite the risks of the physical procedure discussed with the patient's physician, the treatment will likely be beneficial.

The Chabeks present the fallacy that physicians will not be required to discuss a patient's physician condition in conjunction with a proposed procedure or treatment under the opinion by the Court of Appeals. This argument misconstrues the requirements of Hook which observes that the decision as to risk disclosure is a medical question and that a physician must make a medical judgment, considering the state of the patient's health and condition and the adverse effects of a procedure in conjunction therewith, of what risks and factors should be disclosed. Hook, 281 S.C. at 551-53, 316 S.E.2d at 696-98. In an action for failure to provide informed consent, the standard for the risks that the physician should have disclosed is ordinarily measured by expert medical evidence. Id. at 553, 316 S.E.2d at 698. The Hook court's description of the standard being established by "expert medical evidence" reenforces the principle that under the doctrine of informed consent, a physician must disclose those risks inherent in the procedure or treatment, and nothing in that principle states that a physician cannot consider the patient's physical condition in determining what medical risks need to be disclosed.

Expanding the disclosure requirement to include physician-specific information that is not pertinent to the physical act of the procedure would only lead to confusion and uncertainty as to what physicians should disclose about their personal life to patients. There would be no boundary and limitless litigation over what a physician should have possibly disclosed about their personal life after a patient was unsatisfied with the results of a procedure.

The Chabeks cite a number of provisions from the American Medical Association's ("AMA") Code of Medical Ethics, but none of these provisions require or recommend that a physician disclose personal life factors. In fact, the AMA recommends that physicians disclose the following so that a patient can make a well-informed decision to undergo a specific medical treatment:

> (i) the diagnosis (when known);
>
> (ii) the nature and purpose of recommended interventions; [and]
>
> (iii) the burdens, risks, and expected benefits of all options, including forgoing treatment.

Am. Med. Ass'n Code of Medical Ethics § 2.1.1.

Each of the recommended factors to be disclosed are relative only to the treatment itself. The AMA does not include a physician's personal attributes in its view of informed consent. South Carolina's doctrine of informed consent follows the guidance of the AMA.

Of crucial note, no reasonable medical provider believes that it is acceptable for a physician to practice medicine while impaired. There are already deterrents in place to prevent any such misconduct, including a patient's recourse for compensatory and punitive damages against an impaired physician under a cause of action for medical negligence when any such impairment results in injury to the patient. A physician's inability to perform surgery because of an impaired physical condition is not a matter concerning informed consent of the patient, but negligence of the physician.

Other jurisdictions have recognized that impairment is a matter of medical malpractice and not of informed consent. 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 use.

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.; see also Albany Urology Clinic, P.C. v. Cleveland, 528 S.E.2d 777, 780 (Ga. 2000) (finding no duty of physician to disclose his drug use under Georgia's informed consent law and observing that "[a] full and adequate remedy for [the plaintiff's] injuries . . . is already provided by existing law -- the right to sue [the Defendant] for professional negligence.").

Ornelas, Williams, and Albany confirm that if an impairment by a physician causes injury to a patient, redress is available under a medical malpractice action. Key of course is that an impairment of a physician, whether related to alcohol use or otherwise, must "translate into conduct falling below the applicable standard of care" causing injury to the patient. Ornelas, 727 P.2d at 823.

It is significant that the Chabeks did not allege that Dr. Davidson was impaired at the time of

Mrs. Chabek's surgery or that any purported impairment was the cause of any injury to Mrs. Chabek. The Chabeks have suggested that they could be entitled to damages for Dr. Davidson's failure to disclose any issue with alcohol even if no actual injury occurred and the performance of the surgery met the standard of care. See Petition for Writ of Certiorari, p. 12; [R.p. 75, ll. 10-12 (Plaintiffs' counsel: "You can have a claim for lack of informed consent even if the surgery goes fine and everything is good.").]

But even the law of informed consent requires that an injury occur, which in the arena of informed consent is the occurrence of an undisclosed complication. Hook, 281 S.C. at 551-52, 564, 316 S.E.2d at 696-97, 704 ("It is for the plaintiff to show that the undisclosed risk materialized and caused him or her injury and that had the plaintiff been informed he or she would not have submitted to the procedure or treatment."). The Chabeks do not have an informed consent claim in this case; if the Chabeks alleged and had actual evidence that any alcohol use by Dr. Davidson caused Mrs. Chabek injury, the proper recourse would be an action for medical negligence. As the Supreme Court of Pennsylvania recognized, the doctrine of informed consent does not need to be transformed "into a catchall theory of recovery" since other causes of action can provide redress to a patient. Duttry v. Patterson, 771 A.2d 1255, 1259 (Pa. 2001).

Other mechanisms are also in place to prevent any impaired physician from practicing medicine. South Carolina licensing boards require extensive applications and background checks as part of their process for approving medical licenses, and physicians who are found to be impaired by mental health, alcohol, or substance abuse issues may have their licenses to practice suspended and/or revoked. See Brief of the South Carolina Hospital Association as *Amici Curiae* filed Aug. 21, 2023 with the Court of Appeals and *Amicus Curiae* Brief of the American Medical

Association and the South Carolina Medical Association filed Aug. 31, 2023 with the Court of Appeals. Physicians may also be subject to criminal penalties and disciplinary action for practicing while under the influence of alcohol or drugs. S.C. CODE ANN. § 40-47-112.; see also S.C. CODE ANN. § 40-47-110(B)(3), (4), (5), and (8).

Additionally, the AMA advises that to meet ethical guidelines, physicians should ensure they can continue to safely practice medicine by taking appropriate action when their health or wellness is compromised, including:

> 1. engaging in honest assessment of their ability to continue practicing safely;
>
> 2. taking measures to mitigate the problem;
>
> . . .
>
> 3. seeking appropriate help as needed, including help in addressing substance abuse. Physicians should not practice if their ability to do so safely is impaired by use of a controlled substance, alcohol, other chemical agent or a health condition.

Am. Med. Ass'n Code of Medical Ethics § 9.3.1.

The AMA also instructs that "[c]ollectively, physicians have an obligation to ensure that colleagues are able to provide safe and effective care, which includes promoting health and wellness among physicians," see id., and advises physicians to not only maintain their own physical and mental health, but to also intervene and seek assistance for colleagues through the following actions:

> 1. Maintain their own physical and mental health, strive for self-awareness, and promote recognition of and resources to address conditions that may cause impairment.
>
> 2. Seek assistance as needed when continuing to practice is unsafe for patients, in keeping with ethics guidance on physician health and competence.

3. Intervene with respect and compassion when a colleague is not able to practice safely. Such intervention should strive to ensure that the colleague is no longer endangering patients and that the individual receive appropriate evaluation and care to treat any impairing conditions.

4. Protect the interests of patients by promoting appropriate interventions when a colleague continues to provide unsafe care despite efforts to dissuade them from practice.

5. Seek assistance when intervening, in keeping with institutional policies, regulatory requirements, or applicable law.

Am. Med. Ass'n Code of Medical Ethics § 9.3.2.

In *amicus curiae* briefs filed with the Court of Appeals, the American Medical Association, the South Carolina Medical Association, and the South Carolina Hospital Association emphasized that existing law sufficiently protects patients from physicians actively practicing medicine while impaired while also preserving the privacy rights of physicians as to their own personal, medical, or behavioral issues. Confidentiality is important to encourage physicians to seek treatment for any mental health or substance abuse issues they may have which in turn enhances the safety of the medical profession.

For all of the above reasons, the doctrine of informed consent does not need to be modified or expanded in South Carolina. Expanding the doctrine to require disclosure of physician-specific personal factors would lead to subjective and arbitrary questions about which aspects of a physician's personal life must be disclosed. This would result in an unpredictable system of disclosure which would lack clear guidance for physicians. It would unnecessarily complicate the doctrine of informed consent which is intended to advise patients of complications which may occur even in properly performed procedures. Deterrents and preventions exist to protect patients from impaired physicians. Imposing upon physicians an unclear duty of disclosure under the

doctrine of informed consent as to their personal life factors will not increase safety to patients. The Court of Appeals correctly applied the existing law in South Carolina regarding informed consent to conclude that AnMed and Dr. Davidson were not required to disclose Dr. Davidson's alcohol consumption on his own personal time.

CONCLUSION

For the reasons set forth herein, Respondents AnMed Health and Dr. Davidson respectfully request this Court to deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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