

1 THE COURT: Burriss versus AnMed. Your motion to
2 dismiss based on the statute of limitations?

3 MR. SUGGS: Yes, sir. May it please the Court. Trey
4 Suggs here on behalf of Dr. Larry Davidson; Lydia Magee on
5 behalf --

6 THE COURT: Drop your mask for me, if you don't mind.

7 MR. SUGGS: Yes, sir. Judge, it is essentially a
8 three-part argument. The first part of the argument is,
9 as to the case as a whole regarding the statute of
10 limitations. The second part of it is specific to the
11 informed consent cause of action. The third part of it is
12 specific to the general negligence cause of action. So
13 may I take one at a time, Your Honor?

14 THE COURT: Sure.

15 MR. SUGGS: All right. As to the statute of
16 limitations, Judge, this case involves a surgery on
17 December 29, 2017. The notice of intent was filed on
18 February 19, 2021. And as the Court knows, 15-35-35
19 provides a three-year statute of limitation. There is
20 nothing plead in the complaint that tolls the statute, it
21 simply lays out this time period surgery. At this point
22 we claim that it was negligent and then you have the date
23 of filing. So it is our position, Your Honor, that based
24 upon the pleadings themselves, because this is a motion to
25 dismiss, there is nothing in those pleadings to toll the

1 statute and therefore the action is barred by 15-35-35.
2 Alternatively, Judge, if you were to consider the facts as
3 raised by Mr. Wright's memoranda and opposition in motion
4 to dismiss we would submit that the, look at the facts,
5 you convert the motion for summary judgment, we believe
6 that claim continues to be barred. Your Honor, there is a
7 record from January 9, 2018 which would have been beyond
8 three years before the filing where the patient was
9 complaining of pain and tingling in the left arm, spine as
10 well as numbness. She claimed had fallen four times since
11 she got home from the hospital for surgery. The record
12 shows that she continued to have falls, gait issues and
13 pain. And she ultimately followed up repeatedly with her
14 providers and then underwent surgery. We would submit to
15 the Court, Judge, that even if you consider the facts and
16 the allegations in this case under a Rule 56 motion that
17 she was on notice, if she had a claim for medical
18 malpractice as of January 9th, 2018, at the latest and
19 therefore --

20 THE COURT: What paragraph is that in of the
21 complaint? What is the date you just were saying?

22 MR. SUGGS: Judge, the record, January 9, 2018 would
23 have been the date that she went back and made those
24 complaints that we submit would have tolled, or excuse me,
25 would have triggered the statute of limitations. And they

1 didn't file the notice of intent until February 19th,
2 2018. So in sum, Your Honor, it is, it is, we think as
3 plead it fails under the statute, three year statute of
4 limitations. And then if you have to go look at the facts
5 outside of the pleadings themselves, which we suggest is
6 not appropriate, then it still fails under the three year
7 statute because she knew or should have known that she had
8 a claim as of January 9, 2018. That is our position on
9 the statute of limitations.

10 THE COURT: Do you have that January 9th, 2018
11 record?

12 MR. SUGGS: Yes, sir.

13 THE COURT: May I see it?

14 MR. SUGGS: Yes, sir. May I approach?

15 THE COURT: Yes.

16 (Whereupon, the Court reads documents.)

17 THE COURT: Let me ask Mr. Wright. Do you have an
18 objection to me looking at this under the guise of Rule
19 56?

20 MR. WRIGHT: No. No, objection, Your Honor.

21 THE COURT: Do you need additional time to make any
22 filings?

23 MR. WRIGHT: No, Your Honor.

24 THE COURT: All right, sir.

25 MR. SUGGS: Judge, as to the informed consent cause

1 of action. We believe that the Plaintiff --

2 THE COURT: Hang on. Let's do this. Let's do them
3 one at a time.

4 MR. SUGGS: Sure, yes sir.

5 THE COURT: That way I can keep up with it better.

6 MR. WRIGHT: Your Honor, as far as the pleadings
7 themselves, it was specifically noted in the complaint in
8 paragraph 17, that those certain complications eventually
9 led to require a second surgery by Dr. McDonald on June
10 8th, I am sorry, June of 2018 which is well after when the
11 action was filed in February of, in February. Your Honor,
12 and so from just the pleadings themselves it does, there
13 is language in there as far as that would identify when
14 this was, Burris was first informed that she would have
15 the need for a corrective surgery. Your Honor, we did not
16 specifically put information in there about the date of
17 discovery. I don't think that is a requirement that, you
18 know, we have to specifically set out the date of
19 discovery in a pleading. And there is sufficient
20 information in the pleadings themselves to, for the Court
21 to determine when a reasonable person would have been on
22 notice that they would have a potential claim for medical
23 malpractice. Namely in this case, in June of 2018 when
24 she was told she would need corrective surgery, three
25 years from June of 2018 would be June of 2021; well after

1 the February when it was, when the notice of intent was
2 filed.

3 THE COURT: Well, that is the actual date of surgery,
4 correct?

5 MR. WRIGHT: The original date of surgery was
6 December 29th, I believe, of 2017.

7 THE COURT: 2017?

8 MR. WRIGHT: Yes, sir.

9 THE COURT: What did the note show as to when she was
10 advised by her, I guess, Dr. McDonald or anybody working
11 with his practice, that she was going to have to undergo a
12 second surgery?

13 MR. WRIGHT: Yes, sir. Her first notice of that was
14 June of 2018. Your Honor --

15 THE COURT: Hang on. The first surgery, you were
16 talking about the surgery done by Dr. Davidson was in
17 December?

18 MR. WRIGHT: Yes, the first surgery done by Dr.
19 Davidson was a cervical C-5 and 6 --

20 THE COURT: No, no, no. I got you, that is not what
21 I am asking. You are not following me or I am not being
22 clear. When was she told by Dr. McDonald or anyone on Dr.
23 McDonald's behalf or by anyone, that she was going to have
24 to undergo a second surgery as a result of the first
25 surgery?

1 MR. WRIGHT: Not until June of 2018.

2 THE COURT: Not until June of 2018. Do you have that
3 note?

4 MR. WRIGHT: Yes, sir. Also I have, two notes, Your
5 Honor. The first is March of 2018 where they -- let me --
6 where it was noted she was doing well postoperatively and
7 that there was, you know --

8 THE COURT: Pass them all up if you don't mind. I
9 will just look at them.

10 MR. WRIGHT: Yes. So, Your Honor, two things. The
11 first is a record from March 20th, 2018 and the second
12 note is a record from May 31st of 2018. So the record in
13 this --

14 THE COURT: Hang on, hang on. Let me read them.
15 What date was your case filed?

16 MR. WRIGHT: The notice of intent was filed on
17 February 22nd, 2021.

18 THE COURT: Mr. Suggs?

19 MR. SUGGS: Yes, sir.

20 THE COURT: Looking at your exhibit which is May 31st
21 of 2018.

22 MR. SUGGS: Yes, sir.

23 THE COURT: Looking at the note, it appears to be
24 January 9th of 2018.

25 MR. SUGGS: Yes, sir.

1 THE COURT: And comparing those two to the note of
2 3/20/18, when they are saying, the one in March, it says
3 component is in good position without obvious instability.
4 Overall she has done very well from surgery. Will release
5 her back to full duty.

6 MR. SUGGS: Right.

7 THE COURT: I mean, it seems to me, at least as of
8 March of 2018, even though she may have had these prior
9 complaints to fall, her surgery; she is being told
10 everything is good and she is fine.

11 MR. SUGGS: And I see that, Your Honor. I will point
12 out that on the May 31, 2018 note you get back to the same
13 stuff that is referencing the January 9 note which is she,
14 she developed from surgery. In this note itself, they
15 recommended further surgery, they said she did well from
16 surgery. But it is continued with gait disturbance. And
17 it is that gait disturbance back in January that she was
18 complaining of that leads to her surgery.

19 THE COURT: Well, I understand that.

20 MR. SUGGS: So if she was on -- our position, Your
21 Honor, would be she is on notice in January that she has
22 got gait problems, she is falling; et cetera. And that is
23 ultimately the same findings that led to her getting
24 additional surgery. Therefore the triggering symptoms
25 that led to the necessitation of additional surgery, and

1 from argument sake saying it was caused by the initial
2 surgery which is questionable, would have been back in
3 January. So that is when the statute would run. I think
4 that is what the law says.

5 THE COURT: The law says when a reasonable person
6 would have been on notice. And the reason I question it
7 is because a reasonable patient, when they are sitting
8 there on March 20th, even though they had these situations
9 in January.

10 MR. SUGGS: Right.

11 THE COURT: And they reappeared the next, what, in
12 May or June, whenever it was.

13 MR. SUGGS: Yes.

14 THE COURT: When they say the component is in good
15 position, overall you are doing well. Go back to full
16 duty.

17 MR. SUGGS: Right.

18 THE COURT: I mean at that point, a reasonable person
19 would not be on notice that they got a problem that I can
20 see.

21 MR. SUGGS: I guess I am trying to do the
22 intellectual gymnastics in my mind thinking, all right,
23 but she --

24 THE COURT: She had problems in January, granted.
25 And if those, if those persisted every month all the way

1 or, and it continued and continued and continued then I
2 would think, yeah, go back. That is when they first came
3 up. But she hadn't set an appointment when the Doctor
4 said you are doing good, full duty. I mean, it just seems
5 to me that a reasonable patient wouldn't be on notice at
6 that point. Okay, I am good. And all of a sudden they
7 weren't good after that.

8 MR. SUGGS: Right.

9 THE COURT: And then if your notice of intent was
10 filed, you say February, Jay?

11 MR. WRIGHT: Yes, Your Honor, February.

12 THE COURT: So then when May rolls around there would
13 be time, right. So I am going to deny you on the motion.

14 MR. SUGGS: Can I be heard on a couple of specific
15 causes of action?

16 THE COURT: Make your record.

17 MR. SUGGS: No, no. This is totally different
18 argument.

19 THE COURT: Okay. Sure. Both of y'all make your
20 record, all three of y'all make your record. But right
21 now, I know you said you had three arguments. The first,
22 the statute, I am going to deny it.

23 MR. SUGGS: Okay.

24 THE COURT: But let you say what you want to on the
25 record. The next one would be as to informed consent.

1 MR. SUGGS: Yes, sir. Judge, informed consent is a
2 distinct doctrine. And Hook versus Rothstein outlines six
3 elements that our Court considers. And, well actually
4 which is required through the physician to have properly
5 consented a patient. And it is our position, Your Honor,
6 that the Plaintiffs in these cases, and specifically
7 hearing this first. It is trying to expand this doctrine
8 beyond what our Courts have recognized thus far. And I
9 think Mr. Wright and I would, I think you would agree with
10 me that we can't find any cases that speaks specific to
11 this issue before the Court. Which is, does a physician's
12 health or behavioral issues, whether they diagnose or
13 something else, are those to be disclosed to a patient as
14 part of the informed consent process. Judge, that is what
15 the Plaintiffs allegations state and that is what they are
16 trying to do here. And I think it is important to note
17 from the outside, this question is for you because it is a
18 question of duty. And in our case law in South Carolina,
19 there is Miller versus City of Camden; Faile versus South
20 Carolina Department of Juvenile Justice says that the
21 question of duty, whether a duty exist is one for the
22 Court, it is a question of law. And so we are asking you,
23 Your Honor, to declare that as a matter of law a physician
24 such as Dr. Davidson does not have an affirmative duty,
25 within the context and framework of the informed consent

1 doctrine, to make certain disclosures. I am going to
2 sidestep here for a moment and say look, if I think a jury
3 can still consider under a negligence cause of action,
4 under a medical malpractice cause of action; should Dr.
5 Davidson had made certain disclosure, if the Court deems
6 it to be considered. Under negligence, should he have
7 told her this or more importantly I think should he have
8 been operating at this time, should he have made certain
9 disclosures. I accept that, the facts support it. I
10 think that is something that a jury very well may be able
11 to consider. But that is a question of duty under
12 negligence. It is not a question of whether it is one of
13 the six elements under Hook versus Rothstein for informed
14 consent which --

15 THE COURT: What are the six elements.

16 MR. SUGGS: Diagnosis; nature of the procedure;
17 material risks involved in the procedure. And I stress
18 because it is important. Probabilty of success; prognosis
19 and procedures not carried out; and the existence of
20 alternatives. Our Courts say these are the things you
21 have to cover by. I imagine Mr. Wright is going to point
22 out, well it also says that it is a question of what a
23 reasonable patient would want to know. And I would say,
24 yes, that is true. The question of whether there has been
25 a violation as it relates to one of those six elements is

1 whether a jury, a reasonable juror would want, a
2 reasonable person would have wanted to know. But it has
3 got to be within the frame work of those six elements
4 which includes here, the material that is involved in the
5 procedure, the language gives us the answer. Judge has
6 already said there is no South Carolina case that
7 addresses the question. But there is a Georgia case that
8 is absolutely one-hundred percent on point and it was
9 decided under statutory common law, the six elements in
10 Georgia are one-hundred percent the same as South
11 Carolina. Word for word, one through six. And the Court
12 in Albany Urology Clinic versus Cleveland decided whether
13 a surgeon was required to disclose his cocaine addiction,
14 alcohol and cocaine. The Court held that he did not,
15 finding there is neither a common law nor a statutory duty
16 on the part of either physicians or other professionals to
17 disclose to their patients or clients unspecified life,
18 excuse me, unspecified life factors which might be
19 subjectively considered to be adversely affecting
20 professional performance. It goes on with to my final
21 point, or actually my initial point. The Court concluded
22 that, "a full and adequate remedy for the Plaintiff's
23 injuries in this case is already provided by the existing
24 law. The right to sue the Defendant for professional
25 negligence." That is what is going on here, it is not

1 like we are relieving the Plaintiff in this case or any of
2 these other cases without a remedy, they absolutely have
3 remedies. Like I said, if the jury determines that Dr.
4 Davidson made a disclosure they can find him guilty of
5 negligence. But it is not informed consent. Because as I
6 wrote in my memorandum and actually after I kind of
7 created some of this argument about some of these articles
8 talking about the same thing, where do you draw the line.
9 I mean, what has to be disclosed, what doesn't. It is
10 such a gray area, that is why the Court defines the six
11 narrow elements that are required under informed consent.
12 And that is our position, Your Honor.

13 THE COURT: All right. Mr. Wright?

14 MS. MAGEE: I will --

15 THE COURT: I am sorry.

16 MS. MAGEE: I am Lydia Magee. For the record, I
17 represent AnMed Health and I just want to make sure the
18 record is clear that we are joining in with Mr. Suggs very
19 able argument in the informed consent. I did want to draw
20 Your Honor's attention to the Chabek case, although that
21 is on appeal. In that order you did rule that the Court
22 in Chabek did not find or did find as a matter of law, not
23 recognized a duty on this, the disclosure of his or her
24 personal medical or issues. That is on page 11 of that
25 order. I would just ask the Court to be consistent with

1 that prior ruling that you have already made regarding
2 informed consent.

3 THE COURT: I don't want to be consistent. Go ahead.

4 MR. WRIGHT: Yes sir, Your Honor. The first part,
5 are we talking about a duty that is a matter of law. The
6 language, as far as informed consent in that the duty that
7 the physician has is to inform the patient of all material
8 risks involved in the procedure. That is the duty. And
9 there is no question about that. The question of whether
10 he breached that duty is a question of fact. Okay. And
11 so, you know, and there is obviously a dispute --

12 THE COURT: But your argument in this case, based on
13 your complaint, is that he did not disclose that he
14 allegedly was suffering from alcoholism at the time he
15 performed surgery or at the time he gave her the
16 information about the surgery or the informed, informed
17 consent. Right?

18 MR. WRIGHT: Correct.

19 THE COURT: You are not alleging that he did not give
20 her the other six recognized factors that, just want to --

21 MR. WRIGHT: Your Honor, there is no, in the statute
22 there is no --

23 THE COURT: Hang on. Just so I can put my feeble
24 mind around this. Okay. You have got six factors that
25 set out in the common law as to what the doctor has to

1 disclose to give to a patient to have informed consent.

2 Right?

3 MR. WRIGHT: No, sir. No where in those six factors
4 do they give any kind of guidance or clarification or
5 outline of what the specific --

6 THE COURT: Do you not agree with me that the case
7 says they have got to cover these areas?

8 MR. WRIGHT: Yes, sir.

9 THE COURT: Okay. Your argument, if I understand it,
10 Jay, is this. You are not denying that Dr. Davidson spoke
11 to the person, the Plaintiff about these six areas. What
12 you are saying or complaining of, is that in order for her
13 to make a totally informed consent she should have been
14 advised that he was suffering from a relapse of his
15 alcoholism at this point in time when he is giving her
16 information and doing the surgery. That is your
17 complaint, correct?

18 MR. WRIGHT: Your Honor, one of those six factors is
19 that the physician is to inform the patient of all
20 material risks.

21 THE COURT: About the procedure.

22 MR. WRIGHT: No, sir. And that is the key point,
23 involved in the procedure. They would like to make it,
24 they would like the statute to read, risk --

25 THE COURT: If you take your line of thought, Jay,

1 and today I got to disclose I am consuming too much
2 alcohol or I am doing cocaine. Next week is my wife of 15
3 years and I are going through a divorce and maybe my head
4 is not in the right place; or I am going through a custody
5 battle about my kids; or I have been, you know, recently
6 transferred from this position out of the hospital,
7 whatever. Where do you stop with that analysis?

8 MR. WRIGHT: Your Honor, the Court has been wise to
9 stay out of that area, to not judicially try to get into
10 the mind of what a reasonable, medical professional would
11 do or would not do. And that is where there are two
12 schools of thought. One school of thought is, hey, let's
13 specifically identify what material risks are suppose to
14 be, that physician is required to disclose to the patient.
15 And in Georgia, this was an exhibit to my memo. In
16 Georgia, in the case we are talking about, it is codified
17 in the statute. They specifically list out, these are the
18 material risks that a physician is required to disclose to
19 a patient. South Carolina has not done that, South
20 Carolina goes the other way and says, look, we are not
21 doctors, we don't know what a reasonable physician should
22 or should not disclose to a patient. So we are going to
23 leave that to experts in the field. And we are going to
24 require expert testimony to be given to support a specific
25 instance of what should or should not be told to the

1 patient. So, Your Honor, it is not opening Pandora's box,
2 anything at all can be alleged to be a violation of
3 informed consent. No, it would require an affidavit, an
4 expert testimony; a medical professional of the same
5 speciality as that doctor to come in and say, in this
6 specific situation this condition or increases the risk of
7 the procedure to such an extent that it is required for
8 the patient to have knowledge of that so that they can
9 accurately and they are entitled to make these decisions
10 about their own health because they are going under the
11 knife, they are putting their lives in the hands of this
12 physician. And if that physician has a condition that
13 dramatically increases the risk of harm during a surgery,
14 such as being in the midst of an active alcohol substance
15 abuse relapse, then a medical expert can come in and give
16 testimony and say, this should have been told to the
17 patient because it increased the risk to that degree. It
18 is just like in a medical malpractice, Your Honor. There
19 is no judicial outline setting forth what is a deviation
20 from the standard of care. I mean, hypothetically you can
21 get an expert to say whatever you want them to say. But
22 the law is, if you have a medical expert come in and
23 provide expert testimony that this was a deviation from
24 the standard of care then you have met your burden as far
25 as, you know, it being able to proceed to a jury for them

1 to decide whether it should have been, whether there was a
2 deviation or not. It is the same standard for informed
3 consent. If there is expert testimony from a medical
4 expert to say, in this situation this information should
5 have been disclosed then it becomes a question of fact and
6 it is up to a jury to decide whether, you know, it should
7 have been disclosed to the patient or not. And, again,
8 Your Honor, in this specific case we are talking about, it
9 has been alleged that Dr. Davidson was performing
10 neurosurgery's while he was in the midst of an active
11 alcohol substance abuse relapse. In fact, the surgery for
12 Ms. Burris occurred five or seven days after he got the
13 DUI in California. So his drinking was such an extent he
14 had already gotten a DUI, came back and was still doing
15 surgery. He had admitted in his deposition that he was
16 even still using alcohol, after he got the DUI he was
17 still using alcohol.

18 THE COURT: The problem is, 50 or 60 percent of the
19 surgeons at the hospital --

20 MR. WRIGHT: And was actively using and was drinking.

21 THE COURT: The point being.

22 MR. WRIGHT: The point being is that, South Carolina
23 has chosen not to try to codify the specific medical risk
24 that should be told to the patient. They rely on the same
25 statement as it is in a medical malpractice, Your Honor,

1 that if an expert can give testimony that this specific
2 information should have been disclosed to a patient then
3 it can go forward to the jury. And specifically --

4 THE COURT: Are you aware of any case anywhere in the
5 Country that says that a doctor has to provide his patient
6 notice of a substance abuse problem in order to give them
7 informed consent. Is there any cases out there that you
8 are aware of.

9 MR. WRIGHT: Yes, sir. It is basically two different
10 schools of thought. There is some jurisdictions that
11 don't require that; there are others that specifically do.
12 Your Honor, do you have a copy of our second memorandum in
13 opposition?

14 THE COURT: I am sure I do, but go ahead.

15 MR. WRIGHT: Okay.

16 THE COURT: So you say there are cases out there that
17 say that a doctor has to disclose substance abuse
18 addiction, a problem?

19 MR. WRIGHT: Yes, sir. I know we referenced it in
20 our initial brief on appeal. I need to look through and
21 just make sure --

22 THE COURT: Are you talking about in the prior case
23 we were just talking about?

24 MR. WRIGHT: Yes, sir. In our memo, page, yes sir.
25 So this is Henny, (phonetic), versus Williams from

1 Louisiana.

2 THE COURT: What page is this?

3 MR. WRIGHT: This is page five on Plaintiff's second
4 memorandum in opposition. And it is directly on point,
5 Your Honor. This was a case where there was a spinal
6 surgery involving a physician that suffered from
7 alcoholism. For the Henning Courts specifically found
8 that the surgeon breached the standard of care performing
9 the surgery and failed to obtain informed consent by not
10 disclosing his alcoholism. And there is a footnote there.
11 In other cases regarding, other personal conditions of the
12 physician that rose to the level of informed consent from
13 Iowa, Maryland and Wisconsin and California.

14 THE COURT: Go ahead.

15 MR. WRIGHT: And so, Your Honor, in South Carolina
16 the standard is, if the pleadings are alleged that there
17 was a material risk that was not disclosed to the patient
18 and that that allegation is supported by expert medical
19 testimony from a expert doctor of the same field and
20 specialty as the Defendant Doctor who testifies that this
21 is a material risk, that should be disclosed to the
22 patient in this type of surgery. Then, you know, it
23 becomes the question of fact for the jury.

24 THE COURT: Let me ask you this. At this point do
25 you agree that South Carolina has not, this issue has not

1 been before the Courts of South Carolina?

2 MR. WRIGHT: There is no case law specifically on
3 whether a doctor has to disclose a history of alcoholism.

4 THE COURT: Or substance abuse and alcoholism in this
5 State?

6 MR. WRIGHT: That's correct, Your Honor.

7 THE COURT: Go ahead.

8 MR. WRIGHT: And as far as the jury charges in South
9 Carolina, Judge Anderson's charge states that, what is a
10 material risk. A material risk is a material, if a
11 reasonable person, the patient's physician would attach
12 significance to it in deciding whether to submit to the
13 proposed treatment or procedure. And, Your Honor, I think
14 it is pretty self-evident that a patient submitting to
15 specifically a neurosurgery where millimeters can cause
16 dramatic harm and life threatening complications. That if
17 a physician who is planning to perform that type of
18 procedure is currently in the midst of an alcohol
19 substance abuse relapse, that is the information that that
20 is a, that a reasonable patient could attach significance
21 to in deciding whether to undergo a procedure with that
22 particular surgeon or not.

23 THE COURT: So far, now the first one we heard,
24 converted to a summary judgment on the statute of
25 limitations. So far I am hearing this on a 12(b)(6).

1 Does everybody agree with me on that?

2 MR. SUGGS: Yes, sir. May I be heard briefly?

3 THE COURT: I will. Do you agree with that, Mr.
4 Wright?

5 MR. WRIGHT: Yes, Your Honor.

6 THE COURT: So both of you, if you have a novel
7 issue, presented to the Court that 12(b)(6) is
8 inappropriate when you have a novel issue when presented
9 to the Court.

10 MR. SUGGS: I don't know the answer to that question,
11 Your Honor.

12 THE COURT: I am pretty sure, listen, I had a case
13 back some time ago and it was a, involved a bunch of
14 mortgage lending, whatever. And I denied it based on the
15 12(b)(6). And the Supreme Court took it up in their
16 original jurisdiction. And they said, you know, while
17 that is normally ruled, some cases have such public
18 importance to them that we don't apply that in all cases.
19 But about ninety-nine percent sure that the rule is that I
20 am not supposed to grant a 12(b)(6) motion on a novel
21 issue of law. Look that up.

22 MR. SUGGS: If 12(b)(6) is a failure to state a
23 claim, I am trying to wrap my feeble mind around that. I
24 mean what we are essentially saying, Judge, I don't, yes,
25 we are recognizing that we have not found an appellate

1 court decision on that specific issue. But certainly the
2 doctrine of informed consent is not a novel issue. And I
3 don't know, maybe I am not making sense or I am splitting
4 hairs.

5 THE COURT: Well, no. What I understood you to argue
6 to me, Mr. Suggs, these are the elements. And what Mr.
7 Wright is trying to do is add additional elements to what
8 we recognize as being the elements that the doctor has to
9 go over with his patients in order to give informed
10 consent.

11 MR. SUGGS: Right.

12 THE COURT: So basically he is arguing for an
13 additional element, for lack of a better term, to be
14 considered by the Court based on the overall, part that
15 the Plaintiff would want to know this information or
16 relevant in making your determination. That is what I
17 hear.

18 MR. SUGGS: I think that is a fair summary, Your
19 Honor.

20 THE COURT: Just give me one second, one second.
21 This is Palmer versus State at 427 SC 36, it is a criminal
22 case, 829 SE 2nd 255. So novel issues of law should not
23 ordinarily be resolved by, on a 12(b)(6) motion where
24 however the dispute is not as to the underlying facts.
25 But as to the interpretation of the law, the development

1 of the record will not aid in the resolution of the issues
2 and it is proper to decide even novel issues on the motion
3 to dismiss.

4 MR. SUGGS: So we have got, I would argue that is
5 what we have got all day, Your Honor.

6 THE COURT: Well, I don't think so. I mean, I think
7 what you have been arguing and are continuing to argue is
8 that, while these records have been allowed to be produced
9 about his treatment from which he has been, framed all of
10 these pleadings and all of his theory of the case
11 basically, that there is no evidence in the record that
12 shows that he was ever impaired while he was preparing
13 surgeries. In fact his own testimony was, I was never
14 impaired while I did it.

15 MR. SUGGS: I think that is true but I don't think,
16 not only intend that to be in part of my argument here. I
17 am asking the Courts to excel for purpose of this Informed
18 Consent Doctrine, the truth of its allegations. that Dr.
19 Davidson was, in fact, suffering from substance or, excuse
20 me, alcohol abuse disorder during this period of time.
21 And declaring that, if that is in fact true then a jury
22 may be able to consider it as to a medical negligence
23 cause of action. But as it relates to the Doctrine of
24 Informed Consent, that is simply not -- I think you hit
25 the nail on the head when you started talking about, just

1 where would you draw the line, what about this, what about
2 that.

3 THE COURT: Well, I mean, that is an issue, I agree.
4 Tell me, read me that aspect of the charge that you gave
5 me on Anderson's charge.

6 MR. WRIGHT: So, Your Honor, again, it goes to
7 element number three of the --

8 THE COURT: Just read it for me.

9 MR. WRIGHT: It says, a risk is material if a
10 reasonable person in a patient's position would have had
11 significance to it in deciding whether to submit to a
12 proposed treatment or procedure.

13 THE COURT: Okay. Thank you.

14 MR. SUGGS: But it continues. It says, the Doctrine
15 of Informed Consent is based on the general principle that
16 a surgeon has a duty adequately to disclose to his patient
17 the proposed diagnostic therapeutic or surgical procedure
18 to be undertaking in the material risk involved therein.
19 It is talking about risks associated with, you are going
20 to have certain risks for gastric bypass surgery. You are
21 going to have certain risks for appendectomy. You are
22 going to have certain risk for Lasik. That is what it is
23 talking about.

24 THE COURT: I hear you. And I am sitting here
25 thinking, maybe a reasonable person who would have

1 surgery. And I would certainly want to know that if my
2 doctor is drunk, if I am getting ready to have surgery on
3 my brain or my spine or anywhere on me. Now, I am not
4 saying Dr. Davidson is, I am not saying he was. I am just
5 saying, if, as you propose, I take that as true then that
6 is something that would seem to be material that should be
7 related, especially considering the fact that this is a
8 novel issue before the Court.

9 MR. SUGGS: Okay.

10 THE COURT: Yes.

11 MR. SUGGS: One being it has been a little while
12 since I looked at the case but I believe that the case
13 does not have the same factors and elements the one from
14 Louisiana that Jay cited, Mr. Wright cited. It is the,
15 the only ones that I could find that were similar to South
16 Carolina was really the Georgia case. The Georgia case is
17 the one that has the exact same law as we do. And that is
18 why I think it is much closer to the set of facts.

19 THE COURT: Well, in that case in Georgia, what did
20 the trial court do? I mean the reason I am asking, it
21 kind of goes to the standard behind this being a novel
22 issue of 12(b)(6). If the Court said I am not going to
23 grant it because it is a novel issue and this is a
24 12(b)(6) and that is consistent with what we have. And I
25 think there is further need for the development of facts

1 in this case as to, just because this gentleman might have
2 been drinking during this period of time, that doesn't
3 mean that that necessary impacted his ability to perform
4 surgery. It doesn't mean that it did, did or didn't. But
5 those can be something developed further from the facts in
6 this case.

7 MR. SUGGS: I guess my point would go back to, Mr.
8 Wright kept on talking about, well we have got this expert
9 affidavit. My point is, that's the breach. But the
10 question, the duty is the question for the Court. Does
11 that duty exist, is a question of law. It is not a
12 question for an expert. The breach is a question of the
13 expert. The duty is not. So it is up to the Court to
14 declare. It is my position that it is up to the Court to
15 declare doctor, assuming these facts to be true, Dr.
16 Davidson had a duty to disclose that he was drinking under
17 the Informed Consent Doctrine. If the answer is yes, the
18 informed consent claim proceeds. If the answer is, I
19 don't think that is what is contemplated by the informed
20 consent, it does not proceed. The issue still stays alive
21 because it is still part of the negligence cause of action
22 or can be part of a negligence cause of action. I am
23 beating a dead horse, Your Honor.

24 THE COURT: All right. I will just have to think
25 about that one.

1 MR. WRIGHT: I would like to add to that, Your Honor.
2 Again, we agree that the physician has a duty under factor
3 three of the Hook criteria to inform the patient of all
4 material risks involved in the procedure. We are not
5 trying to add any additional factors. We are saying that
6 Dr. Davidson did not inform the patient of a material
7 risk.

8 THE COURT: You are in fact trying to hide the
9 additional factors. Where is there a case that says that
10 they, in South Carolina, says that you have got to tell
11 them about a substance abuse issue. You just got through
12 telling me, this is a novel issue. So you can't argue
13 both sides of the coin.

14 MR. SUGGS: We are arguing, I am saying, Your Honor,
15 that no court, the question that has not been presented to
16 the Court as to whether alcohol use would be a material
17 risk. But the Court's specifically, Your Honor, the Court
18 did specify that the question of a materiality, whether a
19 risk is material or not is not a question of law. That is
20 a question of fact for a jury to determine. The duty is
21 to inform the patient of all material risks. But the
22 question of fact is, is a specific risk of material or
23 not.

24 THE COURT: Well the decision of duty is a question
25 of law, first instance. That is where we are. We are not

1 getting into the materiality of it.

2 MR. SUGGS: Yes, sir. And in our brief on page
3 eight, Your Honor, the question is; Melton versus
4 Medtronics, South Carolina, 389; South Carolina 641. The
5 scope of a physician's disclosure duty is not defined by
6 the Courts, but is instead measured by those
7 communications, a reasonable medical practitioner in the
8 same branch or medicine make under the same or similar
9 circumstances. And we have expert testimony to say that
10 disclosure of an active substance abuse disorder relapse
11 would be a communication that a reasonable practitioner
12 should inform the patient of in the same or similar
13 circumstances.

14 THE COURT: All right. Are you finished on that.

15 MR. SUGGS: Yes, sir. Judge, finally they have
16 included a general negligence cause of action. And
17 specifically they claim that AnMed knew or should have
18 down of Dr. Davidson's drinking and should not have
19 allowed him to continue. And also that Dr. Davidson
20 continued to perform surgery while, "dealing with
21 substance abuse.", which is exactly what we just finished
22 arguing about. They have included that in a general
23 negligence cause of action.

24 THE COURT: General negligence meaning the failure to
25 supervise.

1 MR. SUGGS: And the failure to disclose. Those are
2 the two aspects of that general negligence claim. And,
3 Your Honor, it is our position that that is all medical
4 negligence under SC 15-79-110 which states, defines
5 medical negligence, doing that which a reasonably prudent
6 health care provider would do or not doing that which a
7 reasonable prudent health care provider in an institution
8 would do in the same or similar circumstances. That's
9 what we have here, that is what they are alleging here.
10 And in fact, the Plaintiff's have produced expert
11 testimony on at least, if not both of those. Now, Mr.
12 Wright says, you don't need expert testimony for these
13 issues. And that may or may not be true. He seems to
14 parlay that into the suggestion --

15 THE COURT: You don't need expert testimony on the
16 fact that he was drinking?

17 MR. SUGGS: No, that it was required -- I am not
18 saying he is -- he has suggested, I believe in his brief,
19 that those allegations of general negligence don't require
20 expert testimony. And he seems to parlay that into,
21 because they don't require expert testimony they fall
22 outside of medical negligence and within the general
23 negligence sphere, if you will. And we disagree. Clearly
24 under the statute, 15-79-110 definition, irrespective of
25 whether expert testimony is required. It is still

1 allegations of medical negligence. And you are sitting
2 here thinking, why are you bothering me with this, why are
3 you making a big deal by it. And it comes down to
4 essentially, their attempt to stack as many causes of
5 action and as many occurrences as they can to try to get
6 caps up, is what it is in all of their cases. And my
7 point is, it is a transparent attempt to do so. There is
8 no reason to have, and there shouldn't be a stand alone
9 general cause of action of negligence for those specific
10 allegations because those specific allegations are medical
11 negligence and fall within its first cause of action which
12 is a medical negligence cause of action. That is our,
13 that is our --

14 THE COURT: And those specifications are that the
15 failure to oversee, the failure to disclose.

16 MR. SUGGS: Exactly.

17 THE COURT: Okay. Mr. Wright.

18 MR. WRIGHT: Yes, sir. There is plenty of case law.
19 Not everything that happens in a hospital is professional
20 medical or nursing negligence. Just like if a nurse is
21 suppose to put bed rails on a patient and doesn't do it.
22 The patient falls out of bed and that can be an accident
23 plead as general negligence just because the negligence is
24 just so commonsensical that anyone of any reasonable
25 faculties would be able to recognize what they should or

1 should not do. If they are told to specifically to do
2 something, they are not employing them for judgment. And
3 as far as in the performance of medicine or nursing and so
4 it doesn't rise to medical or nursing by practice.

5 Similarly when Your Honor, in this case, we have alleged
6 medical negligence that he deviated from the standard of
7 care in performing the operation. That required, that is
8 medical malpractice, that requires expert testimony. We
9 have been over the informed consent, that requires expert
10 testimony to say what a reasonable physician should or
11 should not disclose to the patient. The decision by any
12 medical professional to continue to perform delicate
13 neurosurgeries while in the midst of dealing with an
14 active alcohol substance abuse relapse, it is not
15 employing medical judgment, that is a commonsensical
16 issue. That is, that is not deviating from a standard of
17 medical care. That is something that any reasonable
18 person would be able to determine on their own.

19 Obviously, any physician who is impaired should not be
20 doing operations, should not be doing neurosurgery. And,
21 making the decision to continue to perform operations, you
22 know, for income while you are dealing with an alcohol
23 abuse issue is an allegation of negligence that does not
24 require any kind of expert testimony.

25 THE COURT: Now, I do not agree with you on that. I

1 think it does. But go ahead. I think that it does. I
2 think it, you are trying to segregate a malpractice into a
3 simple negligence case based on that. Maybe in the extent
4 that you have a claim against the hospital for failure to
5 properly supervise. But that potentially, that is just a
6 simple negligence case. A surgeon deciding whether or not
7 to continue or not continue or a hospital conjunction with
8 this knowledge allow him to continue, that it is all into
9 a medical negligence case. I just don't see it being a
10 simple negligence case.

11 MR. WRIGHT: Your Honor, medical negligence of
12 malpractice is simply defined as deviating from the
13 standard of care in the act of performance of the
14 procedure.

15 THE COURT: I am aware of that.

16 MR. WRIGHT: Our general negligence claim does not
17 have anything to do with the manner in which or the
18 technique he used to perform the surgery. It was, general
19 negligence to make, that is negligence to make a decision
20 to go forward with deciding to do an operation while
21 knowing that you are in the midst of a substance abuse
22 relapse.

23 THE COURT: All right, I am going to grant your
24 motion on that one. I think you are correct on that.
25 That brings us back to the issue of the alcohol, to the

1 issue of informed consent. That leads us back to, I agree
2 with you on the general negligence claim. It is all
3 wrapped up in the malpractice case. And so it brings us
4 back to the malpractice case and informed consent. Quite
5 frankly, Jay, I have not looked at your expert's
6 affidavit. I will need to. Let me just ask you this. I
7 have read your complaints and you are complete within,
8 there is this and that and the other. It goes on and on
9 and ad nauseam, quite frankly, about that. But when you
10 have your expert say, he deviated from the standard of
11 care in performance of this surgery in the following
12 particulars. And each goes through there, based on going
13 to surgery when he had a relapse or it has specific
14 deviations from when a surgeon should or should not have
15 done.

16 MR. WRIGHT: Yes sir, Your Honor. The expert will
17 give specific testimony as to the deviation --

18 THE COURT: In your notice of intent?

19 MR. WRIGHT: Your Honor, as far as notice of intent,
20 I am sure you are aware, an expert is only required to
21 state one specific act of negligence. He did in his
22 affidavit set forth, I am only required to state one
23 aspect of negligence. And the only aspect of negligence
24 stated in this case was the lack of informed consent. The
25 deviation to provide adequate informed consent. So that

1 was the deviation specified in the affidavit against Dr.
2 Davidson. But yes, Your Honor, the short answer is, if
3 the case were to proceed there would be additional
4 allegations that the expert would put forth regarding the
5 specific deviations in the manner and technique in which
6 Dr. Davidson performed the operation.

7 THE COURT: All right. Well and maybe I am going to
8 fall back on what I was saying earlier. Number one, I am
9 denying your motion as statute of limitations. I am
10 denying it as to the informed consent because this is a
11 novel issue. And additional facts as they may be
12 established as you move forward may somehow change that
13 where the law says, wouldn't change, would change then go
14 ahead and make a call. That is what the holding was. But
15 anyway, I think that as going to the facts of this case
16 and that could change based on how things develop out. So
17 I am granting as to your general negligence claim; I am
18 going to, that is all part of the malpractice case. And
19 so to the extent that they were part of the claim, that
20 they are there, if they are not, they are not. So let me
21 go over with you guys something. Jay, I know you have
22 been around this for a while but I, if you think you are
23 going to go to court and just say, he was drunk during
24 this period of time; she had a bad result; it was
25 malpractice. You can't get beyond that, then you are not

1 going to get to the jury.

2 MR. WRIGHT: Your Honor, we in no way intend to state
3 solely that any, you know, the only allegation being that
4 he was using alcohol.

5 THE COURT: The alcohol, you know, whether it comes
6 in or not, will still have to be seen. I mean, that is
7 not, hadn't been determined to be admissible yet. But it
8 would seem to me that as we are sitting here that when he
9 performed X,Y, and Z procedure this is what he did but
10 should not have done; or this is what he didn't do that he
11 should have done. And that is only exacerbated by the
12 fact that during this period of time he had relapsed, et
13 cetera; et cetera. And, you know, well along with other
14 facts that I am going to hear. But if it is just, he
15 should have told her I was drunk and then she had bad
16 results after that, that second surgery, then it ain't
17 going to the jury. Do you understand what I am saying?

18 MR. WRIGHT: Yes. In the Burris case, this is a case
19 that just started so we are in the very beginning of
20 discovery. I understand there is a whole mess of
21 discovery that needs to be done.

22 THE COURT: Right. I mean, I understand that. But,
23 you know, reading your compliant, you are surely making a
24 whole, I mean, I think I counted eight or ten different
25 paragraphs about his alcohol. So, you know, FY.

1 MR. WRIGHT: Yes sir, yes sir. And, Your Honor, we
2 feel like that was required because it is the very
3 foundation and the basis for both the lack of the informed
4 consent claim and the negligence supervision. I mean,
5 what he has alleged to not have informed the patient of is
6 his active drinking and that he got involved in that. And
7 as far as the hospital supervision, what is alleged is
8 that they were, they had a physician performing
9 neurosurgeries who is in the midst of an alcohol abuse --

10 THE COURT: I have got that, I have got that. That
11 doesn't mean he couldn't walk in there and perform surgery
12 beautifully. It doesn't mean that. It just means he is
13 drinking more than he should have. And it is not to be
14 more. I mean, and the jury will hear it, okay. Because
15 that is such a huge allegation against someone, although
16 it is true. What I have seen so far, it still has got to
17 be more than a generalized, you are drinking and here in
18 this particular case, because of that you have, you
19 committed malpractice. All right.

20 MR. WRIGHT: As it pertains, yes, as far as medical
21 negligence I think we would still have a duty to specify
22 exactly what kind of medical negligence was performed,
23 which we will.

24 THE COURT: Okay. Would you prepare an order.

25 MR. SUGGS: You want a formal order. I will,

1 whatever you want.

2 THE COURT: Whatever, y'all just want me to do a form
3 four saying the motion is dismissed as to the statute of
4 limitations and the informed consent and deny as to the
5 generalized negligence claim is granted.

6 MR. SUGGS: Yes, Your Honor. We have one other
7 pending motion, may we be heard on?

8 THE COURT: Another outstanding motion?

9 MR. SUGGS: Yes, sir. I will, I will try to be --

10 MR. WRIGHT: Judge, real quick. On Thursday we did
11 have a motion to amend the complaint in the Burris case.

12 THE COURT: The rule is, if I grant it you have a
13 right within ten days to amend it. You have a problem
14 with him amending his complaint?

15 MR. SUGGS: Not --

16 THE COURT: Do you have a objection to him amending
17 his claim?

18 MS. MAGEE: No, Your Honor.

19 THE COURT: Y'all accept service today. All right.

20 MR. SUGGS: We filed a motion for injunctive relief
21 related to this blogging, face-booking, et cetera and I
22 know --

23 THE COURT: I read that and I have some real, real
24 concerns about it. And quite frankly, I have raised those
25 issues to you before. I believe from reading your

1 memoranda that I did, I read last night, reading the rules
2 of ethics that apply to attorneys as to advertising, that
3 clearly what you are doing is a direct solicitation to the
4 group of potential patients for Dr. Davidson, during this
5 period of time. You do not have the proper disclaimers on
6 there. I agree also with Mr. Suggs in my reading, subject
7 to you arguing, that this has a potential taint on a jury
8 panel that is to be selected in this case. And my
9 inclination is to grant it and order you to remove it from
10 your website. And on this case and all cases related to
11 Dr. Davidson. So first, I want to hear you as to, and
12 there are other aspects of the ethical rules that you
13 contend to have violated. Two of which I thought
14 applicable, one of which I thought was a stretch.

15 MR. SUGGS: I am more, I am, I care about a fair
16 jury. If we are going to come try this case, in
17 particularly, Judge, like you just said, you haven't said
18 whether any of this is admissible. I mean, the harm that
19 could potentially incur with all of this information
20 floating out there, you come to trial and you say, you
21 know what, you are not getting any of that in here. I
22 mean, to argue that that is not, has a potential to taint
23 the jury or transfer venue. It is disingenuous, Your
24 Honor.

25 THE COURT: I do have a problem with it, Jay. Tell

1 me why I should not require you to take that down from
2 your site.

3 MR. WRIGHT: Yes sir, Your Honor. So number one --

4 THE COURT: Besides the person in them.

5 MR. WRIGHT: Well, the first of all, as far as to the
6 ethical violations, Your Honor, have you reviewed our memo
7 in opposition.

8 THE COURT: I have seen your memo.

9 MR. WRIGHT: Your Honor, we take that very seriously
10 and we went to Dr., Professor Virzi at the University of
11 South Carolina School of Law who teaches professional
12 responsibilities and here is the CV. And he provided an
13 affidavit for us, Your Honor.

14 THE COURT: Just one second. Have y'all seen this
15 affidavit?

16 MR. SUGGS: I have seen the memoranda. I don't
17 believe I saw a --

18 THE COURT: Just let him look at that and let her
19 look at it.

20 MR. WRIGHT: It was attached to as an exhibit to our
21 memoranda. Your Honor, it was filed as an exhibit to our
22 motion --

23 THE COURT: I believe you.

24 MR. WRIGHT: Yes, sir. And so Dr. Virzi, did I give
25 you a copy of this CV, Your Honor. He is an instructor of

1 professional responsibility and is associated with the
2 American Bar Association, Center for Professional
3 Responsibility. He has been on the Ethics Advisory
4 Committee since 2003. Your Honor, I showed him the motion
5 and the motion says for numerous rule or alleges numerous
6 rule violations. Dr. Virzi, we went through them one by
7 one. And I said, Dr. Virzi, is there any substance to
8 these allegations. And he went through each one, rule by
9 rule and specifically sets forth in his affidavit, which I
10 included in my memoranda to this Court, why they do not
11 violate any of the Rules of Professional Responsibility.
12 In fact, points out like I had, Your Honor, that the
13 information complained of, that Dr. Davidson is a former
14 alcoholic. That Dr. Davidson relapsed at his substance
15 abuse disorder relapse in 2016; that he continued to drink
16 progressively. His drinking got worse and worse. That by
17 October of 2017, that he was drinking nearly every day
18 that he was on call. And that he got a DUI in December.
19 All of that are admitted in their answer to our complaint,
20 Your Honor. It is a public record, it is a public
21 admission and there is no ethical violation in publishing
22 public documents, Your Honor. And you can look through,
23 every single ethical rule that they alleged that we
24 violated, Dr. Virzi goes through rule by rule and sets
25 forth in great detail why there was no ethical or no

1 violation of these ethical rules. Okay. So that's number
2 one. Number two is, why is it important that we are
3 unable to put this information out there, Your Honor. And
4 the reason is, just like with, asbestos related cases,
5 there are patients out there who have been harmed by Dr.
6 Davidson.

7 THE COURT: And you are trying to solicit their
8 business.

9 MR. WRIGHT: Like I told you in-chambers many months
10 ago. I don't care if I don't get another case --

11 THE COURT: Jay, I read what your blog said. And you
12 are clearly soliciting their business to come to McGowan,
13 Hood and Felder, or whatever the name of your Firm is.
14 But its, it belies someone with a sixth grade education
15 who reads that to say that that is not in fact what you
16 are doing.

17 MR. WRIGHT: Your Honor, there was an allegation of
18 solicitation, I don't know --

19 THE COURT: Let me ask you this. Based on that blog,
20 how many cases have you picked up?

21 MR. WRIGHT: Your Honor, I don't know to be honest
22 with you. Oh, specifically related to the blog. Like,
23 say, I saw a blog and this is why I am calling?

24 THE COURT: Whatever you want to call that, your
25 information, website or blog or whatever it is you have.

1 But based on the, hang on, let me find it.

2 Where in your memoranda does it have the language
3 about we had, this firm handled this case. What page is
4 that.

5 MR. SUGGS: Judge, it is exhibit b, our memoranda is
6 their log notes. You are talking about, were you a victim
7 of medical malpractice while under the care of Larry
8 Davidson, call us; kind of language?

9 THE COURT: The language basically saying, we are
10 doing these cases and we will help you. I recall last
11 night that is what I read.

12 MR. SUGGS: Page two of our memoranda.

13 THE COURT: Hang on. This is the language that I am
14 referring to. Were you a victim of medical malpractice
15 while under the care of Larry S. Davidson. Did you suffer
16 serious and/or permanent injuries while undergoing a
17 surgical procedure performed by Larry S. Davidson in
18 Anderson or Greenville. McGowan, Hood and Felder, LLC,
19 lead by litigation attorney Jay Wright is currently
20 representing multiple plaintiffs in cases against
21 neurosurgeon Larry S. Davidson and for grossly negligent
22 and medical malpractice, negligent supervision. If you or
23 your loved one was harmed we want to help you.

24 If that is not targeting that group of people, I
25 don't know what in the heck is, regardless of what your

1 witness says or not.

2 MR. WRIGHT: Your Honor, I am not an expert in that.

3 THE COURT: I am not either but I can read.

4 MR. WRIGHT: Yes, sir. But rules, I mean the rules
5 of professional conduct is specifically set forth what an
6 attorney can and cannot do as far as --

7 THE COURT: Right. And from what I read from Mr.
8 Suggs is correct, and I will be candid with all of you, I
9 hate to go back to independently read the rules of ethics.
10 But the rule that he quoted, if you target it, you have
11 got to put this, you have got to preface this as being an
12 advertisement. You have got to end it with given, if you
13 have a complaint this is how you get in touch with the
14 Office of Disciplinary Counsel, et cetera, et cetera.
15 Another mandatory language which obviously was not done in
16 this situation.

17 MR. WRIGHT: Your Honor, and again, Dr. Virzi. who is
18 a Professor of these ethics specifically address Rule 7.23
19 which is what we are talking about. He states that the
20 Rule regulates only the direct solicitation of
21 individually identified clients.

22 THE COURT: You don't think that people who had
23 surgery between those dates that you spell out in your
24 post are individually clients. I disagree with you. They
25 may not be called by name but anybody who is out there who

1 says I had surgery from Dr. Davidson between January 1st
2 and December 31st, whatever -- you are targeting that
3 finite group of people. You are definitely targeting.

4 MR. WRIGHT: Your Honor, he references Rule 7.3
5 comment. Number one, a solicitation is a target
6 communication initiated by a lawyer that is directed to a
7 specific person. A lawyer's communication typically does
8 not constitute a solicitation if it is directed to the
9 general public such as through a website. And he goes on
10 to say, internet posting question is specifically directed
11 to the general public then Rule 7.3 does not apply to that
12 specific communication.

13 THE COURT: So according to your expert, I have to
14 send Jay Wright a specific solicitation say by mail, hey,
15 I heard you had a DUI. I do DUI cases therefore, et
16 cetera. That is where 7.3 applies. But if I say, any of
17 you people who were harmed between this period and this
18 period by this doctor and I put it out over a general
19 email, that is not targeting?

20 MR. WRIGHT: Your Honor, I think I can put it this
21 way, who it was directed to. I would say, I would refer
22 to the experts, Your Honor. I mean --

23 THE COURT: I do, I don't. Sometimes I agree with
24 them, sometimes I don't agree. Just because an expert,
25 their testimony is just like anybody else's.

1 MR. WRIGHT: But you are asking me to question, Your
2 Honor. I would say I would refer to Dr. Virzi and his
3 opinion, that this was -- this specific communication was
4 to the general public. But and also going back, it was,
5 the information relayed in the material was public, was a
6 public record. And all the information they are
7 complaining about is specifically admitted to in the
8 answer to their complaint. And so it goes back, Your
9 Honor, it goes back to what --

10 THE COURT: It really goes back to tainting the jury
11 pool which is a problem in the first place and it is not
12 involving ethical rules one way or the other. I told you
13 from the beginning, Jay, I had a problem with it. You
14 kept on and you kept on. And I just think it is
15 problematic. You know, you are a fine lawyer, you are a
16 good person, I think you are a respectful lawyer. But
17 also at the same time I tend to disagree with your expert.
18 I think it is a direct solicitation to a finite group of
19 people that is expressed by way of a website. And it
20 says, we do medical malpractice. This is one of our
21 representative cases. But we also do this and that and
22 the other. But you are not generally soliciting, you are
23 targeting a finite group of people.

24 MR. WRIGHT: Your Honor, I think, I again, I would --

25 THE COURT: What would be the purpose in adding, if

1 you had surgery between this date and this date. Which
2 coincidentally coincides with his fall from grace and then
3 relapse.

4 MR. WRIGHT: Because that timeframe is very important
5 because that is the timeframe when he was using alcohol.

6 THE COURT: But you are targeting people that he did
7 surgery during that timeframe, that you specifically asked
8 for.

9 MR. WRIGHT: What we are trying to do, Your Honor, is
10 identify the witnesses who were involved and they would
11 witness Dr. Davidson during that timeframe. What we have,
12 again --

13 THE COURT: No, it is not a request for witnesses, it
14 is a request for clients. I am sorry.

15 MR. WRIGHT: Your Honor --

16 THE COURT: Were you a victim of the medical
17 malpractice under the care of Larry S., did you suffer
18 serious or permanent injuries while undergoing surgical
19 procedure. Led by Jay Wright, currently representing
20 multiple plaintiffs in cases against Larry Davidson. You
21 are not asking for witnesses, you are asking for clients.

22 MR. WRIGHT: Your Honor, these publications to the
23 public serve many --

24 THE COURT: I've got that, I've got that.

25 MR. WRIGHT: Okay.

1 THE COURT: It doesn't change the solicitation rules.

2 MR. WRIGHT: Okay. And there is no prohibition
3 against a general, advertising to the general public. And
4 that is what we are trying to do. And as far as what Dr.
5 Virzi points out in his affidavit that we have a
6 constitutional right to commercial speech, Your Honor.
7 That Rules, 7.1, 7.2 and 7.3, regulate lawyers speech as
8 strictly as the Commercial Speech Doctrine allows. So if
9 we are following those rules, Your Honor, we should be
10 allowed to reach out to the public and inform the general
11 public of a potential situation that may lead to them
12 recognizing that they have a claim for medical
13 malpractice. But it is also, you asked me how many
14 clients that come to us because of the blog site. What
15 has come to us are people who are willing to give
16 affidavits that will be witnesses to testify that Dr.
17 Davidson was exhibiting symptoms associated with relapses
18 of drug and alcohol abuse such as explosive behavior,
19 outbursts of anger, that kind of thing. We have a
20 specific affidavit from an Elizabeth Floyd who found us
21 because of the blog site who was going to be a witness in
22 the Riggins case and every other case. Because from the
23 getgo, Your Honor, you remember that they denied, first of
24 all, denied that Dr. Davidson was even drinking at the
25 time. And then they tried, and initially they argued it

1 wasn't that bad. Your Honor, don't worry about it, he was
2 drinking but it wasn't that bad. Come to found out he was
3 drinking alcohol every week and still performing surgeries
4 on patients. And so we have had to dig and dig and dig
5 and dig and this is part of it, Your Honor. This is from
6 Ms. Burris whose case has just began. We have, we need,
7 they are not willingly telling us anything, Your Honor, we
8 have had to dig and scrape for every single piece of
9 evidence that we have had. And if we can get one witness,
10 Your Honor, can be explosive to a case. If we can get a
11 witness, they are still denying that Dr. Davidson was, you
12 know, even in spite of the therapy records that we
13 reviewed, they are still denying that his alcohol use was
14 that bad and had any kind of significant impact on his
15 professional abilities. But we can find a witness who,
16 you know, that comes to us and says, well, yes, I went and
17 visited him and I was worried because he smelled like
18 alcohol or anything to that effect, Your Honor. One
19 witness can totally turn the tie of the case and so I
20 don't --

21 THE COURT: I hear what you are saying and that just
22 goes with any case out there. It doesn't address what is
23 going on with your blog site and what you are saying and
24 what you are putting out there. And the overarching
25 concern I have, ethical violation or not, that, if it is

1 it may be a technical violation. Let me say it that way.
2 Because I think that you are targeting, you are not asking
3 for witnesses, you are asking for victims who have been,
4 who was seriously injured, i.e., you want clients. But
5 all that being said, with this blog going out there, what
6 you just got through arguing is all the reason for me to
7 shut it down. And that is, people are out there talking
8 about it and we come in here and start picking a jury then
9 it is going to be difficult potentially to find a jury
10 that hasn't been tainted by having seen or heard about it.
11 And so my inclination, as I said at the outset of this
12 hearing, is to shut it down.

13 MR. WRIGHT: Your Honor, like I said --

14 THE COURT: If I am wrong, then I am wrong. But
15 regardless of ethical infractions, I do have the right to
16 control litigation leading up to the time of the hearing.
17 I have put gag orders on multiple cases for a lot less
18 going on with this, then in this case.

19 MR. WRIGHT: Yes, sir.

20 THE COURT: And so if you are going to site me a rule
21 that says I can't do.

22 MR. WRIGHT: I have never tried to tell a Judge what
23 he can do.

24 THE COURT: I just saw you looking something up. I
25 mean, you educate me every time we get in here. But I

1 tell you that, you know, I told you in the beginning when
2 I heard this and I am telling you again and your argument
3 to me is we have got witnesses from it. That is the
4 concern to me. The same basis you are out there getting
5 witnesses is the same basis I want to keep it out of the
6 public forum because this doesn't need to be a public
7 discussion, to potentially taint a jury. Okay.

8 MR. WRIGHT: Yes, sir. Your Honor, again, I think we
9 have been over how important I think it is to identify
10 witnesses and also just to generally inform the public.
11 But as far as Rule 3.6, as far as trial publicity, the
12 Rule makes a specific exception for information contained
13 in public record. Everything they are complaining of,
14 Your Honor, has been admitted to in their answer and it is
15 a public record and now they are trying to complain that
16 we are posting information contained in a public record to
17 the public.

18 THE COURT: Well, hang on. I gave you the treatment
19 records under confidentiality order.

20 MR. WRIGHT: Your Honor --

21 THE COURT: Don't waive your finger at me, please.
22 Those aren't public records, those aren't public records
23 and you are getting a lot of the information that you are
24 citing. Because I read those records at least three times
25 myself. And that is where you are coming up with a lot of

1 the allegations you have in your compliant is directed
2 from those treatment records from North Carolina.

3 MR. WRIGHT: Your Honor, we did not reference any of
4 the treatment records.

5 THE COURT: But the information contained in them is
6 being stated in, where else did you get it then?

7 MR. WRIGHT: From Dr. Davidson's deposition. Once he
8 knew we had the therapy records, he did not lie in
9 deposition, he told the truth. So we got everything,
10 everything that is contained in the blog post has both
11 been admitted to in their answer to the complaint and also
12 has been admitted to by the Defendant in his own
13 deposition.

14 THE COURT: And what is that, what is that, give me
15 that Rule and let me look at it.

16 MR. WRIGHT: Yes, sir. Rule 3.6, trial publicity.

17 THE COURT: Just give it to me, I can read it.
18 Well, let me ask you this, Jay. I think I made it clear
19 to you and I think I made it clear today that although you
20 have access to these records, and although he may have
21 admitted them in his deposition; that doesn't mean at this
22 juncture that they are going to be admitted at trial.

23 MR. WRIGHT: Yes sir, I am not sure I understand.

24 THE COURT: What the relevance that has. Well,
25 first, when you say it is part of the public record. I

1 made it clear to you, at least my attempt was to make it
2 clear to you, that while I am letting you have access to
3 this, whether or not this information comes in for the
4 jury is something we cross down the road. So it is not
5 necessarily public record that he had this big huge
6 relapse.

7 MR. WRIGHT: I mean it is admitted to in the answer
8 to the complaint. The answer is the public record.

9 THE COURT: Well, true.

10 MR. WRIGHT: It is specifically, that is admitted
11 that he had a substance abuse relapse. The answer to Ms.
12 Riggins complaint are specifically, I can read it verbatim
13 if you would like me too.

14 THE COURT: No, I do remember you said that. I wrote
15 that down.

16 MR. WRIGHT: And, Your Honor, if we need to modify
17 it.

18 THE COURT: I think you need to take it down. And I
19 haven't ordered you to do that yet. I may, I am debating.
20 Okay. I am trying to be fair to everybody. But at the
21 same time, I have and I have had serious reservations
22 about that.

23 Mr. Suggs.

24 MR. SUGGS: Yes, sir.

25 THE COURT: According to Mr. Wright, you have already

1 admitted in your answer that is a public record. I have a
2 right to bring up stuff in the public record.

3 MR. SUGGS: Judge, his inclusive of that language in
4 his complaint was a direct violation of this Court's
5 order. I too had this case reviewed by an expert who said
6 that he committed ethical violations when he violated your
7 order by including allegations in his complaint directly
8 through the language of the records which you had declared
9 could not be used outside, anywhere, particularly in other
10 pleadings. So he wants to say, well, they admitted, it is
11 part of public record. But it is, in and of itself fruit
12 from the poisonous tree because he violated your order by
13 including it in his complaint to begin with.

14 THE COURT: Fruit from the poisonous tree don't fall
15 far. Sit down. Remind me, refresh my memory as to what I
16 ordered previously in another case.

17 MR. SUGGS: In the Thomas case, Your Honor, you
18 ordered that we produce redacted records and that they
19 were strictly under a confidentiality order pertaining to
20 the Thomas case. Mr. Wright has quoted the records in
21 memoranda filed with this Court, not protected outside of
22 that case. He has used the records in questioning
23 witnesses outside of the Thomas case in violation of that
24 order. He used those records in the language therein to
25 prepare his complaint in Riggins in violation of that

1 order. I mean, and now he wants to say, well, y'all
2 amended it so it is part of public record. Judge,
3 moreover, the allegations, I mean, at one point Mr. Wright
4 is arguing under just allegations, but they are just
5 allegations. He says that essentially that Davidson is a
6 drunk and that as a result, his words, she suffered
7 catastrophic life altering injuries. There has been no
8 evidence to support those allegations. You can couch
9 things in allegations all day long. I can allege that
10 aliens beamed down yesterday and took me to Mars but it
11 doesn't make it true. This is not fair. I just want a
12 fair trial.

13 THE COURT: All right, anything further?

14 MR. WRIGHT: Yes, Your Honor. Specifically when Trey
15 is talking about that we included language from the
16 medical records in the original complaint, he is
17 absolutely right. Trey emailed me, how long did it take
18 me, it took me all of thirty seconds to file an amended
19 complaint. I said, Trey, you are right, I am sorry.
20 Filed an amended complaint and then we went to deposition
21 and just asked Dr. Davidson about his drinking and he
22 admitted all of the allegations. We then amended the
23 complaint in which they have provided answers to. They
24 admitted, we admit that Dr. Davidson has been diagnosed
25 with alcohol use disorder and that he relapsed in 2016.

1 We admit that even though he had a resistant desire to --

2 COURT REPORTER: Wait a minute, Judge. He is talking
3 way too fast.

4 THE COURT: Y'all help Joy now.

5 MR. WRIGHT: We admit that although he had a
6 persistent desire to stop, that the frequency of Dr.
7 Davidson's drinking increased over time. We admit that by
8 October of 2017 Dr. Davidson was drinking near daily
9 unless on call. We admit that he continued to perform
10 surgery pursuant to his normal schedule during the period
11 of time where he was drinking near daily. We admit that
12 Dr. Davidson continued to perform neurosurgeries during
13 the time he was drinking. We admit that Dr. Davidson was
14 charged with a DUI on December 22nd of 2017. It is a
15 public record. All the information -- but whether or not
16 it taints a jury pool, there are close to 120 thousand
17 residents in Anderson, South Carolina at age of 18 who are
18 fit for a jury to serve. The notion that we cannot get 20
19 people to sit in that jury box who have not looked at our
20 blog post is ridiculous.

21 THE COURT: Hang on. Let me just say this. I have
22 heard enough, I don't need to hear anymore from either one
23 of you. I am granting the motion. You are ordered to
24 remove it from your blog. I am not finding that you
25 violated the Rules of Ethics. I think that they were not

1 followed to the technical fashion that they should have
2 been. But I find that overall, that that has a tendency
3 to glut the fair trial of this case and all other related
4 cases against Dr. Davidson. And that it provides this
5 information on an ongoing basis. And I am going to order
6 that you remove it. Okay. Regardless of your free speech
7 right, regardless of anything else, I think that it has a
8 tendency to make a jury pool tainted. And as such not
9 only in this case but all other pending cases that you
10 have against Dr. Davidson. So with that being said, the
11 corollary to granting an injunction is to require a bond.
12 Okay. And your client is going to require to have to pay
13 bond in order to issue that order. I think that under
14 Rule 65, I think it is a Rule, harm to the Defendant in
15 this case and potentially the hospital and this blog is
16 not allowed to go ongoing and so I am going to shut it
17 down. Besides the fact I think it violates, technically
18 the Rules of Ethics. Seems to me that a five thousand
19 dollar bond would be good and sufficient amount to cover
20 any expenses. How much will it cost to take this down to
21 you?

22 MR. WRIGHT: I am sorry, Your Honor?

23 THE COURT: How much is it going to cost your Firm to
24 take this down off the blog?

25 MR. WRIGHT: I have absolutely no idea, Your Honor.

1 Probably not too much.

2 THE COURT: I wouldn't think so. But five thousand
3 seem like a fair and reasonable amount in this case. What
4 amount do you think would be fair and reasonable?

5 MR. WRIGHT: I will refer to you.

6 THE COURT: Okay. It is just not a fair cut call,
7 Mr. Wright, I will be honest with you. I am doing what I
8 think is proper in this case. From the hospital, do you
9 have a position as to the amount of bond?

10 MS. MAGEE: I do not, Your Honor.

11 THE COURT: You joined in, five thousand.

12 MS. MAGEE: I am sorry, Your Honor?

13 THE COURT: You joined in the motion with Mr. Suggs?

14 MS. MAGEE: I joined in all of Mr. Suggs motions,
15 Your Honor and all the arguments.

16 THE COURT: Your client pays another five too.

17 MS. MAGEE: Okay.

18 THE COURT: Unless you want to be heard.

19 MS. MAGEE: Ten thousand total?

20 THE COURT: Yes.

21 MS. MAGEE: And that is with the bond, it doesn't
22 cost that much to take it down.

23 THE COURT: I know. But there is other damages that
24 he suffered, other than just taking it down. Okay. And
25 if you want to, tell me, Mr. Wright says he doesn't care.

1 But I will be glad to hear from you, if you think another
2 amount is appropriate I will be glad to let you argue.

3 MR. SUGGS: Seems like a lot but I am not real, I
4 don't have any experience in this realm.

5 THE COURT: We can let it keep going and then, if
6 five thousand is bothering you then it must not be that
7 big of a deal for you and the other side of things.

8 MR. WRIGHT: It is a big deal to Dr. Davidson.

9 THE COURT: I know it is, 25 and 25.

10 MS. MAGEE: Thank you, Your Honor.

11 THE COURT: All right, prepare an order.

12 MR. SUGGS: Ten days to remove the blogs or not.

13 THE COURT: How long will it take you to get that
14 down, Jay? Ten days, if you need more than ten days y'all
15 talk about it. Any other motions out there?

16 MR. WRIGHT: I don't think so. There is the motion
17 to dismiss the, Anita Chabek.

18 THE COURT: Anita Chabek. The motion to dismiss on
19 Anita Chabek would have been stayed by the appeal under
20 the summary judgment.

21 MR. WRIGHT: That's right.

22 THE COURT: Thank y'all. So covered everything. All
23 the cases I have for you guys, right now, to your
24 knowledge, everything else is settled. When I read that I
25 had outstanding motions, it concerned me because I

1 generally try to keep up with everything I have. I don't
2 think I have had that motion argued in front of me. I
3 know the summary judgment was.

4 MR. SUGGS: So we had hearings set months ago and it
5 was canceled at the last minute. And I think that
6 confused things. But I think --

7 THE COURT: Does anybody disagree that on the motions
8 of the Chabek case, which is on appeal, that I granted
9 summary judgment in, that Rule 205 of Appellate Court
10 Rules would either stay that because it is caught up on
11 the, if they sustain, sustain on appeal and then the
12 motion to dismiss is moot.

13 MR. WRIGHT: That is a good question.

14 THE COURT: Assume it goes up through the whole
15 entire appellate process and it is affirmed. And so the
16 motion to grant summary judgment based on statute of
17 limitations, the case is out, it is done.

18 MR. SUGGS: So how are you going to, if you can't
19 succeed on the motion for summary judgment how are you
20 going to succeed on the motion to dismiss.

21 THE COURT: Two different things but still --

22 MR. WRIGHT: Your Honor, there may be a nuance there
23 because the notice of intent, you dismiss the notice of
24 intent. The allegation is negligence hospital supervision
25 and --

1 THE COURT: Oh, I didn't dismiss the case, I just
2 dismissed the notice of intent.

3 MR. WRIGHT: Well, that is just, I wish they would do
4 away with -- but we filed a notice of intent, they filed a
5 motion to dismiss the notice of intent. The notice of
6 intent is necessarily for an allegation of medical
7 malpractice but it is not required for a motion, a cause
8 of action for informed consent or for a cause of action of
9 hospital supervisions. So I would think that even if the
10 notice of intent were to be dismissed then the
11 inapplicable --

12 THE COURT: The motion to dismiss has not been ruled
13 on. Okay. Does everybody agree with that. The motion
14 for summary judgment was based on your summons and
15 complaint. Is that not correct?

16 MR. WRIGHT: Your Honor, what I have --

17 THE COURT: Pull up that. I have it, I think.

18 MR. WRIGHT: What I have is that they filed a motion
19 to dismiss the complaint.

20 THE COURT: It was a motion for summary judgment,
21 ultimately was granted.

22 MS. MAGEE: There is a form four granting a motion
23 for summary judgment on September 15th.

24 THE COURT: Say that again, please.

25 MS. MAGEE: There is a form four order granting the

1 motion for summary judgment on September 15th, 2021.

2 There was a formal order that was filed after he filed his
3 motion.

4 THE COURT: Right, he has to do that because he is
5 scared that the time would run while --

6 MR. WRIGHT: Right. All of that is under the notice
7 of intent case.

8 THE COURT: Guys, let me say this. My view of this.
9 When I granted summary judgment and you appealed that
10 grant of summary judgment then the motion to dismiss is
11 stayed pending the resolution of the appeal. And I
12 wouldn't hear it if you brought it before me now anyway.
13 Okay. My question really is, are there any outstanding
14 motions other than the motion to dismiss in any case that
15 y'all can think of?

16 MR. WRIGHT: No, Your Honor.

17 THE COURT: And I know I am, if you think of one that
18 I am not, please let us know. It gives me concern when I
19 have things that are outstanding. That being said y'all
20 turn in your memos. Always send me a copy too with my law
21 clerk. Thank you for everything, guys, I appreciate it.

22 MR. WRIGHT: Thank you.

23 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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25

