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OCT 13 2017

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

AMY ELIZABETH WILLIAMS as the
PERSONAL REPRESENTATIVE of
the ESTATE FOR [REDACTED]
[REDACTED], and AMY ELIZABETH
WILLIAMS individually,

Plaintiffs,

vs.

QUEST DIAGNOSTICS, INC., ATHENA
DIAGNOSTICS, INC., ADI HOLDINGS,
INC.

Defendants.

S.C. SUPREME COURT
CA. NO. 3:16-CV-00972-MBS

PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS' MOTION
TO SUBMIT ADDITIONAL MATERIALS

Defendants, as captioned, correctly note in their motion to submit additional material that this Court certified a question of law to the South Carolina Supreme Court more than six months ago, on March 31, 2017. As argued herein, Plaintiffs believe that such a supplement of the certified question is exceedingly untimely and actually would hinder the assessment of an *entirely legal question* with an undeveloped and contentious factual record. The information and background put forward by this Court's Order of Certification contains enough material for the State Supreme Court to answer the instant certified question of law.

Defendants' Request is Untimely.

This Court conducted an open hearing, on January 4, 2017, to address arguments on, among other things, the question of whether Defendants qualify as licensed health care providers

pursuant to S.C. Code § 38-79-410.¹ During the course of oral argument, this Court *sua sponte* raised the prospect of presenting the State Supreme Court with this certified question. Shortly, thereafter, on March 2, 2017, this Court scheduled an *in camera* telephone conference with the counsel for all parties with the express purpose of discussing the scope, language, and contents of the certified question that now pends before the State Supreme Court. Neither during the course of that phone conference nor in the intervening seven months, before this October 3, 2017 motion, have Defendants made any request to supplement or amend the certified question.

Defendants' request is even more inopportune given the procedural posture of the certified question. Final Briefs from both Plaintiffs and Defendants have been filed, July 3, 2017 and September 1, 2017, respectively. And, Plaintiffs filed their Reply Brief on September 21, 2017 with oral argument before the State Supreme Court scheduled just a few weeks from now. The approach to briefing undertaken by Plaintiffs – including the decision not to seek to further amend its pleadings by a withdrawal of the affidavits and attachments in question – has been determined, in no small measure, by the text of the certified question actually proffered by this Court to the State Supreme Court. Adding more than a hundred pages of materials to the certified question at this late stage would do serious harm to the months of work already undertaken and would prejudice Plaintiffs.

The Instant Certified Question is Fundamentally a Legal Question Unassisted by

Additional Evidence.

The question this Court certified to the State Supreme Court is a legal question, one of statutory construction. In particular, the State Supreme Court will be deciding how broadly, or

¹ According to the electronic hearing notice provided by this court, oral arguments on Defendants' motion to dismiss had been originally scheduled for November 30, 2016.

narrowly, to apply § 38-79-410 and the language, “or any similar category of licensed health care providers.” Such a question provides this state’s highest court with the first opportunity, in nearly twenty five years, to address the definitional scope of “licensed health care provider.” Moreover, legal research suggests that the instant certified question will be the first time any South Carolina appellate court has considered the question of whether an entirely new industry – genetic research and testing – will receive the protections of this state’s medical malpractice statutes.

Such an important, and “novel issue of local law” should not be determined, or even significantly influenced, by select portions of an expert’s affidavit. (Order of Cert. p. 3) This is especially true given that the requested inclusion of these affidavits arise in a circumstance where no discovery, at all, has been undertaken. As such, Plaintiffs’ experts have had no opportunity to expand upon their statements, to offer clarity on any nuanced and/or complex portions of the affidavits through deposition testimony, or even amend their statements to better align with the allegations of Plaintiffs’ Amended Complaint.

By requesting the inclusion of these affidavits and exhibits, Defendants attempt to further the quasi-judicial estoppel argument of their Final Brief, where the nontechnical use of the word “diagnose” is treated as conceded proof that these Defendants are health care providers. Such an argument begins on page one in the Final Brief of Defendants (attached Exhibit A) and continues throughout. Obviously, if Plaintiffs did concede to the argument that Defendants are licensed health care providers this motion, as well the certified question itself, would not be necessary. Given that the certified question at issue is entirely a legal one, centered on statutory construction, additional evidentiary material – without clarification or qualification – will not

assist the State Supreme Court in answering this question and will likely tend to confuse the issues before the State Supreme Court.

Plaintiffs Reference the Complaint in the Same Limited Way as the Order of Certification.

Defendants' eleven bullet-point "sampling" from the Final Brief of Plaintiffs is presented to suggest that because Plaintiffs made references to the underlying litigation, giving rise to the certified question, that this somehow excuses Defendants' attempts to draw on information not set forth in the Order of Certification, drafted and submitted by this Court. Of course, Plaintiffs are required to make generalized references to the underlying action in their Brief pursuant to Rule 208(b)(1)(C), SCARC as part of the Statement of the Case. "The statement shall contain a concise history of the proceedings, insofar necessary to an understanding of the appeal." The Statement of the Case is a required portion of Plaintiff/Appellant's Brief and optional in Defendant/Respondent's Brief. See Rules 208(b)(1) and (2), SCARC; (also see Rule 244(e), SCARC treating the Plaintiff in a certified question as the Appellant for briefing purposes.) Appellate Rule 208(b)(1)(C), SCARC then goes on to bar "contested matters" in the Statement of the Case – another point Defendants' Final Brief ignores, – and the Rule requires "as a minimum" a description of "the nature of the action or matter" as well as "the nature of the defense or of the response." *Id.*

Further, Rule 208(b)(1)(D), SCARC allows for a "separate statement of facts," and Plaintiffs contend that their references to the underlying action and Defendants' motion to dismiss, by and large, reflect the Order of Certification and/or are uncontested recapitulations of the arguments and legal positions taken by the parties throughout this litigation. A review of the Order of Certification finds references to the parties, the alleged facts giving rise to a potential

cause of action, the importance of the “2007 Report,” and the Defendants’ response, which seeks to invoke the relevant statute of repose as a defense. S.C. Code § 15-3-545. As reflected by the Appellate Rules, a certain amount of background and references to the underlying case, even in a certified question, are not only helpful to the State Supreme Court but required. Distinguishably, Plaintiffs’ references to the foregoing differ in both quantity and scope to those proffered by Defendants.

As noted above, Defendants’ Brief focuses extensively on Plaintiffs’ affidavits and other attachments, without any opportunity for explanation or expansion, and the appearance of the word “diagnose” so as to suppose that Plaintiffs have conceded the central argument at issue in this certified question. Following Plaintiffs’ objections to these improper references to materials outside the effective record on appeal, Defendants now seek through this motion to have this Court validate their refusal to limit themselves to the information contained within the Order of Certification. This Court should not sanction, at this late stage, Defendants’ failure to abide by Rule 244(b), SCARC, which indicates that the State Supreme Court “will not consider any document or other evidentiary materials unless the certifying court has submitted those materials.” This is especially true given that should the State Supreme Court believe additional materials are necessary, then that Court may make such a request under this same rule. *Id.*

Alternatively, Plaintiffs Would Amend their Pleadings.

Assuming Plaintiffs get a favorable ruling in the instant certified question and some discovery in this matter can begin, then one would have to assess the procedural posture of this District Court matter as exceptionally early in its development. As this Court well knows, no Answer to the Complaint or Amended Complaint has been submitted by Defendants. Moreover,

the affidavits are factual in nature and not particularly necessary at what is still the pleadings stage in an ordinary negligence action. As such, Plaintiffs would, if this Court allows, amend its Amended Complaint by simply striking all the attachments incorporated therein. Such an action may moot the instant motion, and since Plaintiffs expect both parties to have a fully developed opportunity to make factual arguments if the case moves forward, eliminating these attachments now would not prejudice either party.

Conclusion

As argued above, Plaintiffs believe that a supplement of the certified question at this late stage is both unwarranted and untimely. Moreover, the inclusion of additional evidentiary materials without an opportunity for clarification would hinder the assessment of an *entirely legal question* with an undeveloped and contentious factual record. The facts and procedural history contained within this Court's Order of Certification sets forth enough information for the State Supreme Court to answer the instant certified question of law. As such, Defendants' motion to supplement the certified question should be denied.

(SIGNATURE PAGE TO FOLLOW)

Respectfully submitted,

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October 11, 2017

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