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U.S. District Court

District of South Carolina
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S.C. SUPREME COURT

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Case Name: Shaw v. Psychemedics Corporation

Case Number: 7:17-cv-01626-TMC

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Certification of Issue to State Supreme Court. Signed by Honorable Timothy M Cain on 12/6/17. (kmca)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Wilmot Shaw,)
)
Plaintiff,)
)
v.)
)
)
)
Psychemedics Corporation,)
)
Defendant.)
_____)

C/A No. 7:17-cv-1626-TMC

ORDER OF CERTIFICATION

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S.C. SUPREME COURT

This negligence action arises out of employee drug testing. Plaintiff Wilmot Shaw brought this action alleging state law claims for negligence and negligent supervision against Defendant Psychemedics Corporation. In preparing this case for trial, it has become apparent that there is an issue central to this action which has not been addressed by controlling precedent of the South Carolina appellate courts. As a result, the court finds it appropriate to certify an issue to the South Carolina Supreme Court.

I. Standard

Certification of a question of state law is appropriate when the federal tribunal is required to address a novel issue of local law which is determinative in the case before it. *Grattam v. Board of School Comm'rs*, 805 F.2d 1160, 1164 (4th Cir. 1986). South Carolina Appellate Court Rule 244 provides that the South Carolina Supreme Court:

in its discretion may answer questions of law certified to it by any federal court of the United States . . . when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to

the certifying court there is no controlling precedent in the decisions of the Supreme Court.

SCACR 244(a). The certification order must set forth: (1) “the questions of law to be answered”; (2) “all findings of fact relevant to the questions certified”; and (3) “a statement showing fully the nature of the controversy in which the questions arose.” SCACR 244(b).

II. Background and Factual Findings

Plaintiff is a former employee of BMW at its Spartanburg, South Carolina manufacturing facility, and during his employment with BMW, Plaintiff was subject to random drug testing. BMW contracted with Defendant to test hair samples of its employees. On April 12, 2014, Defendant received Plaintiff's hair sample at its testing facility. On April 21, 2014, BMW informed Plaintiff that Defendant had found his hair had tested positive for cocaine and benzoylecgonine. On April 22, 2014, Plaintiff underwent a hair drug test with OnPremises Solutions SC on his own, which was negative for any illegal substance, including cocaine. Thereafter, BMW permitted Plaintiff to submit a second hair sample to Defendant for testing, which Defendant received on May 2, 2014. The second test performed by Defendant resulted in positive findings for cocaine and benzoylecgonine. Plaintiff alleges that “he is not, and has never been a drug user,” and has filed suit based upon Defendant’s “negligent testing procedures,” which allegedly produced a “false positive” result.

III. Discussion

As noted above, Plaintiff asserts two causes of action against Defendant: negligence and negligent supervision. For both causes of action to be viable, Defendant must owe a legal duty to Plaintiff. Defendant contends that it did not owe Plaintiff a legal duty of care and that Plaintiff is therefore precluded from bringing a negligence-based claim against it. On the other

hand, Plaintiff asserts that Defendant owed a legal duty of care to Plaintiff.

The parties and the court recognize a split among several jurisdictions regarding whether a drug testing company owes a duty of care to employees tested pursuant to its relationship with an employer. A number of jurisdictions have determined that a drug testing laboratory owes no duty to an employee when the drug test is ordered by and used solely for the benefit of an employer. See, e.g., *Tricoski v. Lab. Corp. of America*, 216 F.Supp.2d 444 (E.D. Pa. 2002) (applying Pennsylvania law); *Frank v. Delta Airlines, Inc.*, No. 3:00-CV-2772, 2001 WL 910386 (N.D. Tex. 2001) (applying Texas law); *Roche Biomedical Lab., Inc.*, 61 F.3d 313, 316 (5th Cir. 1995). Other jurisdictions, however, have recognized a duty running from a drug testing laboratory to a non-contracting individual whose biological specimen was tested for the presence of drugs. See, e.g., *Webster v. Psychomedics Corp.*, No. 2010-01087-COA-R3-CV, 2011 WL 2520157, *6 (Tenn. Ct. App. 2011); *Berry v. Nat'l Med. Servs.*, 205 P.3d 745 (Kan. Ct. App. 2009).¹ South Carolina courts have not addressed this issue and this question is submitted to determine whether South Carolina courts would recognize a duty of care by the drug testing laboratory to the Plaintiff, an employee subject to random drug testing by his employer.

The court has determined that this action presents an issue which is uncertain and there is no South Carolina law precedent. Therefore, the court concludes that these factors weigh in favor of certification in the present case. Moreover, there is a split of authority in other states. Additionally, the issue concerns a matter of vital public concern and will arise in future cases where the negligence of a drug testing company is at issue.

¹See also Majorie A. Shields, Annotation, *Liability of Clinical Laboratories for Negligence*, 19 A.L.R.6th 793 (originally published in 2006).

IV. Certified Question

The court certifies the following question to the South Carolina Supreme Court:

Under South Carolina law, does a drug testing laboratory that has a contract with an employer to conduct and evaluate drug tests owe a duty of care to the employees who are subject to the testing so as to give rise to a cause of action for negligence for failure to properly and accurately perform the test and report the results?

V. Conclusion

Based on the foregoing, the court **CERTIFIES** the question set forth above to the South Carolina Supreme Court. The clerk shall forward a copy of this order under this court's official seal to the South Carolina Supreme Court.

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge


December 6, 2017
Anderson, South Carolina

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