Appellate Case No.: 2017-002538

In The

The Supreme Court of South Carolina

Wilmot Shaw,

Plaintiff

v.

Psychemedics Corporation,

Defendant

ON CERTIFIED QUESTION TO THE SOUTH CAROLINA SUPREME COURT

BRIEF OF THE PLAINTIFF

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III. JURISDICTIONAL STATEMENT

This case is before the Court on the basis of a certified question submitted by the Federal District Court for the District of South Carolina which was accepted by this Court on January 19, 2018.

IV. STATEMENT OF THE ISSUE

Certified Question

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. STATEMENT OF THE CASE

Plaintiff Wilmot Shaw filed an action for negligence and negligent supervision in South Carolina State Court on March 29, 2017 alleging that he was harmed as a result of a botched drug test performed by the Defendant Psychemedic Corporation (hereinafter referred to as "Defendant" or "Psychemedics"). The Defendant had a contract with Mr. Shaw's employer, BMW Corporation, to perform drug tests of its (BMW's) employees. The Defendant filed a Motion to Dismiss. After a hearing at the District Court level, the Court submitted the certified question of whether South Carolina law imposes a duty of care to employees on Defendant's such as Psychemedics Corporation who perform drug tests on such employees pursuant to contractual

relationships with such employees' employers. Given the magnitude of the issues involved and the fact that, despite the prevalence of conflicting legal authority from a number of jurisdictions, the question has not yet been answered by courts in South Carolina.

VI. STATEMENT OF THE FACTS

As no discovery has yet taken place in this case, and this case was submitted on the basis of a pre-Answer Motion to Dismiss by Defendant, the Plaintiff relies solely on the allegations in his well plead Complaint for the background of the case giving rise to the Certified Question. Such Complaint allegations are stated below in their as follows:

¶6. Plaintiff alleges that he is the victim of Defendant's negligent testing procedures.

¶7. Plaintiff began his employment with BMW, LLC (hereinafter referred to as "BMW") in August 2000 as a Production Associate.

¶8. Plaintiff's employment with BMW ended on April 23, 2014 as a result of Defendant's negligent testing procedure that resulted in a false report.

¶9. Plaintiff contends that at all times during the course of his employment with BMW, Plaintiff performed his job duties with due diligence, to the best of his abilities, and without receiving any disciplinary actions.

¶10. On or about March 30, 2014, BMW selected Plaintiff for a random drug test. The drug test was administered onsite by one of Spartanburg Regional Hospital's contract nurses who removed a hair sample from Plaintiff's back.

¶11. On or about April 11, 2014, Plaintiff submitted to another drug test as back hair could not be used as a sample for a drug test. Defendant supplemented the back hair sample with a replacement test using Plaintiff's chest hair.

¶12. On April 12, 2014, Defendant received Plaintiff's hair sample.

¶13. On April 21, 2014, BMW's agents informed Plaintiff that, based on Defendant's report, Plaintiff tested positive for cocaine and benzoylecgonine. Thus, Defendant alleged that Plaintiff failed the drug test.

¶14. Despite Plaintiff's vigorous denial of the use of any illegal substance, BMW suspended Plaintiff, pending an investigation.

¶15. On April 22, 2014, Plaintiff, seeking to clear his name and reputation with BMW, underwent testing by an independent drug lab located in Spartanburg, South Carolina called OnPremises Solutions SC (hereinafter referred to as "OnPremises"). Plaintiff submitted a sample of his chest hair for the test. ¶16. OnPremises issued a lab report on April 25, 2014, clearly showing that Plaintiff tested negative for any illegal substance, including cocaine. However, BMW would not accept the OnPremises results.

¶17. On May 1, 2014, Plaintiff submitted to another drug test; another sample of Plaintiff's chest hair was taken.

¶18. On May 2, 2014, Defendant received Plaintiff's chest hair sample.

¶19. On May 7, 2014, Defendant reported that Plaintiff tested positive for cocaine and benzoylecgonine. Thus, Defendant alleged that Plaintiff failed the drug test. ¶20. Upon information and belief, Defendant employed several employees to include a Medical Director, lab supervisor, and Nursing Staff who both negligently collected Plaintiff's hair samples and negligently corresponded with Plaintiff's employer regarding the grounds for Plaintiff's termination from employment. Defendant negligently failed to properly train and supervise its employees and to have in place adequate measures to ensure that its employees properly removed Plaintiff's hair sample, complied with proper chain of custody procedures, and competently interacted with Plaintiff's employer. As a result of Defendant's failure to adequately train and supervise its employees, Plaintiff's drug test was flawed and a false positive result was issued by Defendant.

¶21. Plaintiff was terminated despite Plaintiff's concern that Defendant's drug test was flawed.

¶22. On September 29, 2014, Plaintiff, fighting to gain back his employment with BMW, took a polygraph test. Plaintiff passed the polygraph test regarding the issue of drug use showing that Plaintiff was not (and never) took or ingested any illegal substance.

¶23. Plaintiff has suffered great humiliation, embarrassment, and mental anguish due to the flawed test results, as he is not, and has never been a drug user.

VII. SUMMARY OF THE ARGUMENTS

Argument I

The Defendant owed Plaintiff a duty of care in the performance of Plaintiff's drug test.

VIII. ARGUMENTS

The Defendant owed Plaintiff a duty of care in the performance of Plaintiff's drug test, thus the answer to the Certified Question must be in the affirmative.

It is abundantly clear based upon South Carolina that the Defendant owed Plaintiff a clear duty of care as Plaintiff's career and reputation depended on Defendant not negligently collecting hair samples or negligently administering the drug tests which are the subject of the instant suit. In a negligence action, a plaintiff must show that the (1) defendant owed a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages. *Steinke v. South Carolina Dep't of Labor, Licensing and Reg.*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999) (citations omitted). It is for the Court to determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff. Id.

In their argument before the District Court the Defendant states, "BMW contracted with Psychemedics to provide occupational workplace drug testing for BMW's sole benefit." Defendant, in essence, desires to shield themselves from liability by relying on their contractual relationship with BMW and lack of privity with employees such as the Plaintiff. The exact purpose of drug testing in the workplace requirement is to ensure drug free workers who benefit from wage based employment with BMW. This contractual relationship benefits Defendant who receives financial remuneration from their contractually performed drug tests, it benefits the employer (in this case BMW) by ensuring that their workers remain drug free, and it benefits and affects the employees who are subjected to drug tests and perceivably receive benefits from working in a work environment devoid of drug use. The Defendant's attempt to use this intermingled and

interconnected contractual relationship as a shield from tort liability must therefore fail. The relationships between the parties are such that they are inexorably intertwined and codependent upon each other. A lack of privity of contract has never barred negligence claims in this state.

In fact, South Carolina courts have found that tortfeasors (such as Psychemedics) are liable for foreseeable injuries to third parties regardless of a lack of privity of contract. Interestingly, the Defendant's argument in the instant case before the District Court is the exact same failed argument this very Defendant made on appeal in our neighboring state of Tennessee in the 2011 case of *Webster v. Psychemedics, Corp.* 2011 WL 2520157, June 24, 2011. In *Webster*, after trial and appeal of a similar botched drug test case, the court in Tennessee held that Psychemedics owed a duty of care to third party employees in the administration of drug tests, stating: We agree with the conclusion of the trial court that Psychemedics owed a duty of due care in administering the drug test to Mr. Webster. When an individual is required, as a condition of employment, to submit a sample for testing, a duty of care is imposed between the professional testing entity and the employee. As a company contracting with employers across the country to perform substance abuse testing, Psychemedics is aware that the likely effect of a false positive result is significant and devastating to an employee; employment will likely be terminated and future prospects of employment adversely impacted. Laboratories like Psychemedics are in the best position to guard against injury, as they are solely responsible for the performance of the testing and the quality control process and are better able to bear the burden financially than the employee harmed by a false positive report.

The court in *Webster* makes it clear that this very Defendant has a track record of being sued for the very behavior complained of by the instant Plaintiff, that courts have held that this Defendant does, in fact, owe a duty of care to employees injured as a result of their negligent testing procedures, and that this very Defendant has been held liable by juries for similarly botched drug tests. It would be very detrimental to the foreseeable victims of their negligence if they are now allowed to set up shop in South Carolina and engage in similar negligent behavior as that engaged in during their Tennessee activities only this time without any accountability. Very fortunately for the citizens of Tennessee, the court was prudent in imposing a duty of care upon their testing activities. South Carolina jurisprudence mandates that our citizens receive the same protection. As was elegantly stated by this very Court in *Dorrell v. South Carolina Dept. of Transportation*, Supreme Court of South Carolina, September 27, 2004, 361 S.C. 312, 605 S.E.2d 12: A tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party. *Barker v. Sauls*, 289 S.C. 121, 122, 345 S.E.2d 244, 244 (1986) (citing *Terlinde v. J.F. Neely, Sr.*, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980)). The tortfeasor's liability exists independently of the contract and rests upon the tortfeasor's duty to exercise due care. Id. (citing *Edward's of Byrnes Downs v. Charleston Sheet Metal Co.*, 253 S.C. 537, 542, 172 S.E.2d 120, 122 (1970)). This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs. See *Terlinde*, 275 S.C. at 399, 271 S.E.2d at 770 (stating that the "key inquiry" in determining whether to impose liability is "foreseeability, not privity").

In its arguments before the District Court, the Defendant attempts to rely on Texas law and unpublished opinions in an effort to bolster their otherwise weak argument that the Defendant should be able to negligently administer drug tests (and get paid for doing so) while, at the same time, enjoying complete and total immunity for any harm that they may cause to individuals foreseeably injured as a result of such negligence. There is no binding South Carolina opinion in Federal or State Court which affords the Defendant such a convenient luxury.

In South Carolina, "this common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs. (stating that the "key inquiry" in determining whether to impose liability is "foreseeability, not privity")." See *Terlinde*, 275 S.C. at 399, 271 S.E.2d at 770. *Mayfield v. National Ass'n for Stock Car Auto Racing, Inc.*, United States District Court, W.D. North Carolina, Charlotte Division, May 18, 2010, 713 F.Supp.2d 527.

In fact, the Supreme Court of Wyoming agreed with this very same reasoning in determining that drug testing companies owe a duty of care to third party employees. (see *Duncan v. Afton, Inc*, Supreme Court of Wyoming, November 30, 1999, 991 P.2d 739, 15 IER Cases 1370, 991 P.2d 739).

In Duncan, the plaintiff was an employee of Solvay Minerals which, like in the instant case, was contracted to a defendant drug testing company. The suit arose, much like in the instant case, after there were several irregularities in the administration of a urine test, including questions about the chain of custody and the conditions for collecting and preserving the sample. As a result of the defendant's alleged handling of the test the plaintiff was fired. He sued defendant for negligence

in handling and processing the urine sample making claims that he wasn't intoxicated and that the defendant was negligent in the handling of the drug test. Upon being dismissed by the lower courts, the Wyoming Supreme Court reviewed the case as a case of first impression, and after extensive legal analysis found that the key issue, similar to the question posed in the instant Certified Question, was the risk of future harm to others and foreseeability of such harm. The court found that plaintiff's negligence action was viable as the drug testing company owed a legal duty to the third party plaintiff irrespective of the lack of contractual privity between the parties.

The Court in Pennsylvania when confronted with a similar issue in the oft cited case of *Sharpe v. St. Luke's Hospital*, 573 Pa 90, 821 A.2d 1215, April 25, 2003 which dealt with a defendant hospital which allegedly botched the drug testing for a contracted employer then attempted to allege that they had no duty to the tested employees. The court in that case, much like the courts of Tennessee and Wyoming, found that the hospital would be in the best position to ensure the non-negligent collection and handling of the specimens with the ability to limit its liability, so the consequences of imposing a duty on the hospital would not be unreasonable.

In addition to the above cases, and many others, the court in Illinois presents a very compelling rationale for imposing a duty amid circumstances very similar to that of the instant case involving another drug testing company. In *Stinson v. Physicians Immediate Care, Ltd.*, 646 N.E.2d 930, 269 Ill.App.3d 659, 207 Ill.Dec. 96 (Ill.App. 2 Dist., 1995) the court states as follows:

> According to the plaintiff, the relationship between the parties was such that a duty should be imposed on the defendant. In arguing that count I sets forth only a duty

> to the plaintiff's employer, the defendant confuses concepts of contract and tort law. There need not be a contract between the plaintiff and the defendant for the defendant to owe a tort duty. For example, in *McLane v. Russell* (1989), 131 Ill.2d 509, 515, 137 Ill.Dec. 554, 546 N.E.2d 499, the supreme court ruled that, in an attorney malpractice case, an attorney may owe a duty to a third party if the nonclient can show that he was the intended beneficiary of the attorney-client relationship. In a case very similar to the present one, *Lewis v. Aluminum Co. of America* (La.Ct.App.1991), 588 So.2d 167, cited by neither party, an employee sued a drug-testing laboratory for falsely reporting to his employer that he had failed the drug test. The court found that the drug-testing laboratory owed a duty to the plaintiff, pointing out that the plaintiff was known to the defendant, and, when the defendant analyzed the plaintiff's specimen, it knew that negligent testing could wrongfully identify the plaintiff as a drug user. The defendant also was aware that, if the test results it submitted to the plaintiff's employer were inaccurate, the plaintiff's reputation and employment opportunities would be harmed. (Lewis, 588 So.2d at 170.) Similarly, in *Elliott v. Laboratory Specialists, Inc.* (La.Ct.App.1991), 588 So.2d 175, another case involving the same drug-testing laboratory, the court explained: "We also find the existence of a non-contractual obligation between Elliott and LSI. To suggest that LSI does not owe Elliott a duty to analyze his body fluid in a scientifically reasonable manner is an abuse of fundamental fairness and justice. LSI should be held responsible for its conduct. * * *

The law in South Carolina supports the imposition of a duty of care to drug testing companies such as Psychemedics to citizens foreseeably injured as a result of their negligent acts. To hold otherwise would merely serve to embolden such companies to negligently engage in activities which threaten the livelihoods and personal liberty of individuals subjected to their drug testing activities. The principals of fundamental fairness and justice demand that the foreseeable victims of Defendant's negligence have a method of civil legal recourse. Plaintiff therefore respectfully requests the Court answer the Certified Question in the affirmative.

IX. CONCLUSION

Based on the foregoing, this Court should answer the Certified Question in the affirmative and find that contracted Drug Testing companies such as Defendant owe a duty of care to employees such as Plaintiff to properly and accurately perform employee drug tests and report the results to their employers.

Respectfully Submitted,

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February 15, 2018

STATEMENT WITH RESPECT TO ORAL ARGUMENT

Counsel believes that oral argument would be helpful in elucidating the complexity and novelty of these issues.

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief complies with Rule 244 of the South Carolina Appellate Court Rules.

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February 15, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2018, a copy of the foregoing Appellant's Brief was served on counsel of record by email and US Mail to:

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