

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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MAR 19 2018

ON CERTIFICATION PURSUANT TO RULE 244, SCACR S.C. SUPREME COURT  
United States District Court for the District of South Carolina  
Timothy M. Cain, District Court Judge

Appellate Case No. 2017-002538

Wilmot Shaw,

Plaintiff,

v.

Psychemedics Corporation,

Defendant.

**BRIEF OF DEFENDANT**

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## CERTIFIED QUESTION FOR REVIEW

“Under South Carolina law, does a drug testing laboratory that has a contract with an employer to conduct and evaluate drug tests<sup>1</sup> 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?”

South Carolina law has long held that a cause of action for negligence in South Carolina requires a sufficient relationship between the parties, which is lacking here between the Plaintiff employee and Defendant drug testing laboratory. Prevailing case law in other jurisdictions using analogous negligence principles likewise would impose no duty of care on Defendant.

For these reasons, Defendant respectfully requests that the Court answer the certified question in the negative.

## STATEMENT OF THE CASE

The procedural history set forth by Plaintiff in the Jurisdictional Statement section of his brief is an adequate account of the proceedings that brought the Certified Question before this Court.

Plaintiff is a former employee of BMW. (Am. Compl. at ¶¶ 7, 8). During his employment with BMW, Plaintiff was subject to random drug testing. (See Am. Compl. at ¶ 10). BMW contracted with Psychemedics to test Plaintiff’s hair sample. Plaintiff’s first hair sample was collected onsite at BMW by a local hospital’s contract nurse – not by Psychemedics. (Am. Compl. at ¶ 10). Psychemedics received the hair sample on April 12, 2014. (Am. Compl. at ¶ 12). Plaintiff

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<sup>1</sup> It is important to note at the outset that the scope of the Certified Question does not contemplate the *collection* of samples and this Court is not tasked with addressing the question of whether a *collector* of a sample would owe a duty of care to the employee. There is no logical or consistent allegation by Plaintiff here that Psychemedics collected the hair sample.

alleges that, on April 21, 2014, BMW informed him that Psychemedics had found his hair had tested positive for cocaine and benzoylecgonine. (Am. Compl. at ¶ 13). Plaintiff alleges that BMW suspended him, pending an investigation. (Am. Compl. at ¶ 14).

Plaintiff further alleges that, on April 22, 2014, he submitted his own hair sample for testing with OnPremises Solution SC. (Am. Compl. at ¶ 15). The OnPremises test was allegedly negative for any illegal substance. (Am. Compl. at ¶ 16). BMW permitted Plaintiff to submit a second hair sample to Psychemedics for testing, which Psychemedics received on or about May 2, 2014. (Am. Compl. at ¶¶ 17-18). The second test performed by Psychemedics also resulted in positive findings for cocaine and benzoylecgonine. (Am. Compl. at ¶ 19). Finally, Plaintiff alleges that “he is not, and has never been a drug user.” (Am. Compl. at ¶ 23).

Plaintiff alleges that he was terminated from employment by BMW on April 23, 2014, because Psychemedics’ “negligent testing procedures” produced a false positive result. (*See* Am. Compl. at ¶¶ 6, 8, 20, 23, 26-28). Nearly three years later, Plaintiff now asserts two claims against Psychemedics: negligence and negligent supervision. (*See* Am. Compl. at ¶¶ 24-36).

Plaintiff’s allegations are nothing more than broad, speculative accusations. Aside from one unsupported, conclusory statement in the Amended Complaint it is entirely unclear that Plaintiff is asserting a Psychemedics employee collected the additional hair samples. Rather, the collector sent the samples to Psychemedics’ laboratory in California for testing. Psychemedics had no other involvement in the process. To now contend that Psychemedics acted as the collector of the samples, and not solely the tester of the samples, is nothing more than pure speculation posited only to steer this Court from the correct ruling that Psychemedics does not owe a duty of care to Plaintiff, which could expand the Certified Question beyond its intent.

Plaintiff believes that Psychemedics' tests were "wrong," without alleging that Psychemedics collected the sample and providing no indication of why the drug tests were "wrong." While not directly applicable to this Court's task of determining whether Psychemedics owes Plaintiff a legal duty in testing his hair samples under South Carolina law, Plaintiff's bare-bones allegations illustrate the policy concerns with hailing Psychemedics (and other testing companies like it) into court based on pure guesswork. Regardless, as stated herein, South Carolina law does not extend a duty of care from Psychemedics to Plaintiff. Plaintiff is not without avenues for redress, which may include suits against the employer or the collector. However, Plaintiff cannot pursue a negligence-based claim against Psychemedics under South Carolina law.

### ARGUMENT

**South Carolina law does not place a duty of care on a remote drug testing laboratory that has only contracted with an employer to conduct and evaluate employee hair drug tests so as to give rise to a cause of action by an employee for negligence.**

A review of South Carolina precedent indicates that a remote drug testing facility hired by an employer to conduct hair drug tests of the employer's employees owes no duty of care to the employer's employees, particularly where that laboratory has not collected the hair. Thus, this Court should answer the Certified Question in the negative and foreclose the ability of Plaintiff to bring a cause of action for negligence against Psychemedics.

**A. Plaintiff improperly asks this Court to expand a cause of action for negligence in South Carolina beyond a reasonable scope.**

To state a claim for negligence under South Carolina law, a plaintiff must show that (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty by a negligent act or omission; and (3) the plaintiff's alleged damages proximately resulted from that injury. *See Cooper v. Laboratory Corp. of Am. Holdings, Inc.*, 150 F.3d 376, 379 (4th Cir. 1998). In a negligence action, if no duty exists, the defendant is entitled to judgment as a matter of law.

*Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 39, 533 S.E.2d 312, 316 (S .C. 2000). The existence of a duty owed is a question of law for the Court. *Id.*

Under South Carolina law, a legal duty may be created by statute, contract, relationship, status, property interest, or some other special circumstance. *Rayfield v. South Carolina Dep't of Corrections*, 297 S. C. 95, 100, 374 S. E. 2d 910, 912 (Ct. App. 1988), *cert. denied*, 298 S. C. 204, 379 S. E. 2d 133 (1989); *see also McCall v. DHEC*, 315 S.C. 205, 432 S.E.2d 503 (Ct. App. 1993) (there is no common law duty to act; an affirmative legal duty may be created by statute, contract, status, property interest, or some other special relationship). Here, neither party disputes that South Carolina law imposes no duty of care on Psychemedics by statute, contract, status, or property interest. So, this Court must determine whether there is a sufficient relationship between Plaintiff and Psychemedics under South Carolina common law to place a duty of care on Psychemedics, which would create a cause of action for negligence. Indeed, South Carolina courts have determined that, for negligence liability to attach, the parties must have a relationship recognized by law as the foundation of a duty of care.<sup>2</sup> *Ravan v. Greenville County*, 315 S.C. 447, 434 S.E.2d 296 (S.C. Ct. App. 1993); *see also Lanier v. Norfolk S. Corp.*, 256 F. App'x 629 (4th Cir. 2007) (imposing no liability for negligence on the defendant because it had no direct relationship with the plaintiff). Where this relationship is "too attenuated" a duty will not arise. *See Id.*

On a certified question, this Court held that a duty did not exist between an insurance adjuster and adjusting company to an insured that sustained substantial fire damage. *See*

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<sup>2</sup> As Plaintiff did before the District Court, Plaintiff argues that the foreseeability of injury is enough to give rise to a duty of care in this case. However, foreseeability is *not* enough to give rise to a duty of care under South Carolina law, which ensures that the concept of duty in tort liability is not extended beyond reasonable limits. *See Williams v. Preiss-Wal Pat III, LLC*, 17 F. Supp. 3d 528 (D.S.C. 2014); *see also Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010) (“ . . . foreseeability of injury, in and of itself, does not give rise to a duty in a negligence action.”).

*Charleston Dry Cleaners and Laundry v. Zurich*, 355 S.C. 614 (2003). In *Charleston Dry Cleaners*, the plaintiff submitted proof of loss statements of over \$200,000.00 following fire damage to the place of employment, but the adjuster rejected the proof of loss statements and the insurer only paid about \$30,000 to cover the losses. 355 S.C. at 617. The plaintiff business owner alleged that the adjuster and adjusting company owed it a duty of care and breached that duty by failing to exercise due care in the adjustment of the fire claim. *Id.* This Court, as a matter of first impression, held that no duty existed, rejecting the plaintiff's argument that foreseeability of harm was enough to create a duty. *Id.* at 619 ("foreseeability of injury is an insufficient basis for recognizing a duty") (citing *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376 (1986)). Specifically, this Court recognized that financial harm was foreseeable if the adjuster performed her investigation in a negligent manner and rendered a report to the insurer that would cause the company to refuse payment. *Id.* Even that foreseeability of harm was not sufficient to create a duty of the adjuster to the business owner. *Id.*

This Court should also determine that South Carolina law imposes no duty on Psychemedics because the relationship between Plaintiff and Psychemedics is too attenuated. Psychemedics' laboratory is in California. The laboratory received the two samples from the collector and sent the results to the employer, BMW, pursuant a contract to perform hair testing of BMW's employees. Psychemedics had no contractual relationship or contact with Plaintiff. Plaintiff was unknown to Psychemedics and did not communicate with Psychemedics. Psychemedics had no knowledge or control over how BMW would use the test results. BMW terminated Plaintiff, not Psychemedics. Simply put, the relationship between Psychemedics and Plaintiff places no duty of care on Psychemedics and therefore Plaintiff has no cause of action for negligence against Psychemedics.

**B. Prevailing case law in other jurisdictions using analogous negligence principles would impose no duty of care on Psychemedics.**

This Court should follow the reasoning in several jurisdictions that have determined specifically that a drug testing laboratory owes no duty to an employee for a drug test ordered by and used solely for the benefit of an employer. *See, e.g., Frank v. Delta Airlines, Inc.*, 145 Lab. Cas. (CCH) ¶ 59447, 2001 WL 910386 (N.D. Tex. 2001) (applying Texas law); *Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313, 316 (5th Cir. 1995) (applying Texas law and holding that a laboratory owes no duty of reasonable care to an employee whose urine is tested for drugs at the request of his employer); *Herbert v. Placid Ref. Co.*, 564 So.2d 371, 374 (La. Ct. App. 1990) (applying Louisiana law and holding that a laboratory owes no duty of care to test subjects because its relationship is with the employer not the employee); *see also Pehle v. Farm Bureau Life Ins. Co., Inc.*, 397 F.3d 897 (10th Cir. 2005); *see also Hale v. SmithKline Beecham Clinical Labs.*, 203 F.3d 831 (9th Cir. 1999); *see also Tricoski v. Laboratory Corp. of America*, 216 F. Supp. 2d 444 (E.D. Pa. 2002) (applying Pennsylvania law).

In *Hammond v. City of Philadelphia*, the court dismissed a plaintiff's complaint against a drug testing laboratory hired by his employer to test his urine sample. 164 F. Supp. 2d 481, 483 (E.D. Pa. 2001). In concluding that a drug laboratory owes no duty of care to a customer's employee when it performs drug screening tests on the employee on behalf of the customer, the court focused on the relationship between the employee and the testing laboratory in determining the laboratory owed no duty to the employee. *Id.* The court stated: "[the testing laboratory] tested plaintiff's urine on behalf of the [employer]. There are no allegations of any other relationship between [the testing laboratory] and plaintiff. [The testing laboratory] owed no duty of care to plaintiff. In the absence of a duty of care, plaintiff cannot make out a negligence claim against [the testing laboratory]." *Id.* at 483-84.

Similarly, in *Frank*, the plaintiff's employer subjected the plaintiff to a random drug test and submitted the plaintiff's sample to the defendant laboratory for testing. 2001 WL 910386 \*1. The laboratory examined the plaintiff's results and concluded that the plaintiff's sample had been adulterated. *Id.* The laboratory reported its results to the plaintiff's employer, and the employer terminated the plaintiff. *Id.* The plaintiff disputed the laboratory's conclusions and sued the laboratory for negligence in finding and reporting that his drug screen was adulterated. *Id.* Evaluating the claim under Texas law, the court concluded that the laboratory, which was contracted by the plaintiff's employer, owed no duty to the plaintiff because the laboratory had no relationship with the plaintiff other than to test his urine sample. *Id.* at \*2. Accordingly, the court dismissed the plaintiff's claim with prejudice as he could not show a *prima facie* case of negligence against the laboratory absent a duty. *Id.* This Court should also determine that the relationship between Psychemedics and Plaintiff is too attenuated to impose a duty of care on Psychemedics.

**C. Several cases Plaintiff relies upon differ.**

While Psychemedics recognizes that other jurisdictions have imposed a duty on drug testing companies in similar circumstances, this Court should find the jurisdictions who do not impose a duty more instructive. While the courts in jurisdictions imposing a duty focus on foreseeability of harm and fairness to workers, many fail to adequately address whether the relationship between the parties is sufficient to impose a duty of care on the testing facility, which is an analysis that South Carolina law demands. Further, several cases Plaintiff relies upon differ and should not be followed.

For example, in *Stinson v. Physicians Immediate Care, Ltd.*, an Illinois appellate court held there is a relationship between a plaintiff employee and a defendant drug testing laboratory if it is reasonably *foreseeable* that the plaintiff will be harmed if the defendant negligently reports test

results to the employer. 269 Ill. App. 3d 659, 664, 646 N.E.2d 930, 933 (1995). Notably, however, the laboratory in *Stinson* was involved in all stages of the process – from *collection*, handling, and testing<sup>3</sup> – the specimen. As above, Plaintiff here makes no allegation that Psychemedics collected his hair. Also, in light of *Charleston Dry Cleaners*, foreseeability alone is not enough to create a duty on Psychemedics in this case; South Carolina law demands a higher threshold. This Court should determine that the relationship between Psychemedics and Plaintiff is too attenuated to impose a duty of care on Psychemedics.

Further, the cases cited by Plaintiff from other jurisdictions addressing whether a *collector* owes a duty of care are inapplicable to this case. Plaintiff relies on a Wyoming case, *Duncan v. Afton, Inc.*, 991 P.2d 739, 740 (Wyo. 1999), and a Pennsylvania case, *Sharpe v. St. Luke's Hosp.*, 573 Pa. 90, 93, 821 A.2d 1215, 1217 (2003), in an effort to convince this Court that a duty should be imposed on Psychemedics. However, the courts in both *Duncan* and *Sharpe* narrowly held that a company who *collects* a urine specimen as part of an employer's drug testing program owes a duty of care to the employee who submitted a specimen. 991 P.2d at 746; 573 Pa. at 93, 821 A.2d at 1217. Neither court directly addressed whether a testing laboratory owed a duty to the plaintiff. *Sharpe* is also distinguishable because the defendant hospital knew of the plaintiff's identity and

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<sup>3</sup> The plaintiff in *Stinson* also set forth his allegations with specificity, further illustrating the deficiencies in Plaintiff's claim here: "...plaintiff's employer and that the defendant breached this duty by committing one or more of the following negligent acts: (1) failed to instruct its employees of the danger of specimen contamination; (2) failed to use specimen containers with sealable and tamper-evident lids; (3) failed to seal the specimen containers; (4) failed to obtain the plaintiff's initials or otherwise identify the specimen as belonging to the plaintiff; (5) conducted the drug-screening test so that the results were not accurate and were in error; (6) erroneously tested and reported that the plaintiff had cocaine in his body; and (7) failed to use routinely followed precautionary procedures, including the use of sterile specimen containers, the use of tamper-evident seals, the use of identifying marks on specimen containers, and otherwise conducted the drug-screening test so that the results erroneously diagnosed cocaine in the plaintiff's body." *Stinson*, 269 Ill. App. 3d at 661, 646 N.E.2d at 931. Here, Plaintiff merely alleges that the drug test results were "wrong."

the purpose of the test. Here, Plaintiff was unknown to Psychemedics and Psychemedics had no knowledge or control over how BMW may use the test results. Plaintiff was employed by BMW, and BMW terminated Plaintiff. Undoubtedly, *Duncan* and *Sharpe* are distinguishable from the allegations here.

Plaintiff also continues to cite *Webster v. Psychemedics Corp.*, No. 2010-01087-COA-R3-CV, 2011 WL 2520157 (Tenn. Ct. App. June 24, 2011), to apparently cast Psychemedics in a bad light. *See Brief of Plaintiff*, at 9 (“... this very Defendant has a track record of being sued for the very behavior complained of by the instant Plaintiff.”) Plaintiff continues to claim that Psychemedics was “negligent” in that case as well, while ignoring the fact that the only impact of the ruling was to allow the claim to move past the pleading stage. Further, the court in *Webster* did not sufficiently address the key inquiry of whether the relationship between Psychemedics and the plaintiff imposed a duty on Psychemedics. Rather, the court focused on the “foreseeability” inquiry, as Plaintiff does here, which, in and of itself, is not sufficient to determine the existence of a duty. Psychemedics asserts that *Webster*’s ruling does not give it a poor “track record.” To the contrary, Psychemedics has an excellent “track record” of obtaining favorable judgments at all stages of litigation because its testing methods are scientifically sound and reliable.

Plaintiff claims that dismissing Plaintiff’s claims against Psychemedics will grant Psychemedics “complete and total immunity.” This is complete hyperbole; whether some other claims would lie against Psychemedics is not before this Court. What is clear is that as the drug testing laboratory (not the sample collector and not Plaintiff’s employer), Psychemedics has an insufficient relationship with Plaintiff to sustain Plaintiff’s negligence claims. In short, Psychemedics owes no duty to Plaintiff. As such, this Court should answer the Certified Question in the negative.”

## **CONCLUSION**

For the reasons discussed above, and the analysis from other courts on this issue, Defendant respectfully submits this Court should answer the Certified Question in the negative and hold that a drug testing laboratory that has a contract with an employer to conduct and evaluate drug tests owes no duty of care to employees who are subject to the testing so as to create to a cause of action for negligence.

Respectfully submitted,



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Attorneys for Defendant

**STATEMENT WITH RESPECT TO ORAL ARGUMENT**

Counsel for Psychomedics also believes that oral argument would be helpful in elucidating the novelty of these issues.

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CERTIFICATE OF COUNSEL

Counsel for Defendant certifies that the Brief of Defendant complies with Rule 211(b) to the extent this certification is applicable to briefs filed in response to certified questions of law.



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PROOF OF SERVICE

I certify that I have served on this 19th day of March, 2018, the Brief of Defendant on counsel for the Plaintiff by depositing copies of the same in the U.S. Mail, first class postage prepaid, addressed as shown below:

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