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S.G. SUPREME COURT

Appellate Case No.: 2017-002538

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In The  
The Supreme Court of South Carolina

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Wilmot Shaw,

*Plaintiff*

v.

Psychemedics Corporation,

*Defendant*

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ON CERTIFIED QUESTION TO THE SOUTH  
CAROLINA SUPREME COURT

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REPLY BRIEF OF THE PLAINTIFF

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### III. ARGUMENT

Without restating the issues or making redundant arguments which have been thoroughly set forth in the Plaintiff's prior briefs, the Plaintiff offers the following points of clarification and rebuttal to the arguments raised by Defendant.

**1. Plaintiff has not improperly asked this Court to expand a cause of action for negligence in South Carolina beyond a reasonable scope.**

Although the Defendant has presented the argument that the relationship between Plaintiff and Defendant is to "attenuated" to impose a duty of care on Defendant, the law in South Carolina strongly suggests otherwise.

In support of Defendant's flawed legal argument, the Defendant has proffered *Charleston Dry Cleaners and Laundry v. Zurich*, 355 S.C. 614 (2003). This case is easily distinguishable from the instant case for a myriad of reasons.

To establish a cause of action for negligence, a plaintiff must show three elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) damage proximately resulting from the breach of duty. *E.g.*, *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986). The Court must determine, as a matter of law, whether the law recognizes a particular duty. *E.g.*, *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. *Carson v. Adgar*, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997). Foreseeability of injury, in and of itself, does not give rise to a duty. *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. at 376, 346 S.E.2d at 325.

Specifically, *Charleston Dry Cleaners* dealt with the issue of whether an independent insurance adjuster or company could be held liable in tort by an insured. While the Court did not

recognize a duty in that particular case, the relationship in the instant case between the Plaintiff and the Defendant is easily distinguishable from *Charleston Dry Cleaners*, especially once the instant case is considered.

The instant case involves a Defendant who (as pleaded in Plaintiff's well pled Complaint) was actively involved in both the collection and testing of hair samples which the Defendant collected from BMW employees, in addition to being involved in the training of BMW employees regarding the collection and processing of said hair samples. Although the Court in *Charleston Dry Cleaners* found no duty in that case, it is readily apparent the adjusting company defendants, namely GAP and Townsend, were agents of Zurich. This means that their authorized acts were imputable to Zurich under the principles of agency. "We note, however, that "the authorized acts of an agent are the acts of the principal." *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 242, 489 S.E.2d 470, 472 (1997). In addition, a bad faith claim against the insurer remains available as a source of recovery for a plaintiff such as Dry Cleaners. Therefore, in a bad faith action against the insurer, the acts of the adjuster or adjusting company (agent) may be imputed to the insurer (principal)". *Charleston Dry Cleaners and Laundry v. Zurich*, 355 S.C. 614 (2003).

**The instant case requires no such analysis of the law of agency as the Complaint in the instant case indicates that it was the actions of Psychemedics itself which gives rise to Plaintiff's independent negligence claims against Psychemedics.**

Indeed, the law in South Carolina actually provides for liability under similar circumstances. In support of this argument Plaintiff has offered *Dorrell v. South Carolina Department of Transportation*, Supreme Court of South Carolina, September 27, 2004, 361 S.C. 312, 605 S.E.2d 12.

The Court in *Dorrell* dealt with the issue of whether a contractor could be held liable in tort to foreseeable persons injured by the contractor's negligence. The Court found in the affirmative on this issue. The instant case is more akin to *Dorrell* than it is to *Charleston Dry Cleaners* as the Defendant's relationship with BMW is not one of agency but rather a contractor relationship. The Defendant maintains its own independent judgment and processes as it relates to the performance of its services as oppose to being a proxy for BMW. Given this relationship it is not unreasonable for this Court to impose a duty of care on Defendant as it relates to third parties foreseeably injured by Defendant's negligence. Plaintiff respectfully requests that the Court rule accordingly and hold Defendant's relationship with Plaintiff sufficient to establish a duty of care.

**2. Analogous negligence principles in other jurisdictions impose a duty of care on Psychemedics.**

As was discussed at length in Plaintiff's Opening Brief, the Defendant is quite familiar with being subjected to liability in negligence regarding its negligent testing procedures. The court in *Webster v. Psychemedics, Corp.* 2011 WL 2520157, June 24, 2011, in fact, dealt with this very issue and determined that Psychemedics owed a duty of care to employees drug tested as a result of Psychemedics' relationship with the employer.

The elements of negligence in Tennessee are essentially the same as that in South Carolina, to wit "(1) a duty of care owed by the plaintiff to the defendant, (2) conduct by the defendant that breaches this duty, (3) an injury or loss, (4) a cause-in-fact connection between the plaintiff's injury or loss and the defendant's conduct, and (5) the existence of proximate or legal cause." *Eskin v. Bartee*, 262 S.W.3d 727, 735 n.19 (Tenn. 2008) (citing *Draper v. Westerfield*, 181 S.W.3d 283, 290 (Tenn.2005)).

The citizens of South Carolina deserve no less protection than the citizens of Tennessee as it relates to the reckless and negligent dealings of the Defendant. Although the Defendant indicates

that *Webster* is being cited to “cast the Defendant in a bad light”, this assertion does not negate the sage jurisprudence espoused in *Webster* as it relates to the court’s ruling. The Defendant attempts to discredit the *Webster* court by diminishing the fact that the court found a sufficient relationship between Psychemedics and the tested employees to impose a duty of care. Although the Defendant undoubtedly disagrees with the court’s findings, this disagreement in no way impacts the legitimacy of the *Webster* court’s decision. As is stated in Plaintiff’s Opening Brief, the law as articulated in numerous other jurisdictions also imposes such a duty.

The law in South Carolina concerning negligence is analogous to the law in Tennessee and other jurisdictions as is articulated above in *South Carolina State Ports Auth* and Plaintiff’s opening brief.. Plaintiff, therefore, respectfully requests that the Court find that Defendant owes Plaintiff a duty of care in negligence.

#### IV. CONCLUSION

For the reasons discussed above, and the analysis from other courts on this issue, Plaintiff respectfully submits that this Court should answer the Certified Question in the affirmative and hold that a drug testing laboratory contracted with an employer to conduct and evaluate drug tests owes a duty of care to employees who are subject to the testing so as to create a cause of action in negligence.

RESPECTFULLY SUBMITTED,

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Dated

