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***823** TORTS--LIABILITY IN EMPLOYER-MANDATED DRUG TESTING--DRUG LABORATORIES HAVE NO DUTY TO WARN EMPLOYEES THAT INGESTION OF CERTAIN SUBSTANCES COULD CAUSE FALSE POSITIVE TEST RESULTS, SMITHKLINE BEECHAM CORP. v. DOE, 903 S.W.2D 347 (TEX. 1995)

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"There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it." [FN1]

I. Introduction

With the proliferation of drugs in modern society, the policy of employers has been to screen employees and prospective employees for drug usage. [FN2] As employers face potential liability for the torts of their employees, pre-employment drug screening tests serve to deter employee drug use, increase employee productivity, and promote job safety. [FN3] Drug testing serves valuable purposes, but at the same time, it also places an employee's privacy, reputation, career, and livelihood on the line. Unfortunately, these tests and their procedures are not infallible, false positive results do occur and disastrous consequences can follow.

***824** SmithKline Beecham Corp. v. Doe [FN4] required the Texas Supreme Court to begin to define the drug laboratories' legal responsibility to persons tested. [FN5] In this case of first impression, the Texas Supreme Court held that despite reporting an individual's false positive results to her prospective employer, the laboratory owed no duty to warn that ingestion of certain substances could cause these false results. [FN6] The court, in an opinion by Justice Nathan L. Hecht, concluded that such a duty could not readily be defined because it would require the laboratory to inform each test subject of all possible causes of positive results other than using drugs. [FN7]

The purpose of this Note is to analyze why the Texas Supreme Court refused to impose a duty to warn on drug laboratories and the impact that SmithKline will have on test subjects who bring negligence suits against drug laboratories. As a backdrop, Part II of this Note presents the facts and procedural history of SmithKline. [FN8] Part III examines the establishment of a legal duty and, particularly, a duty to warn. [FN9] Also, Part III describes the balance between the importance of warning about known medical facts versus penalizing drug laboratories with an unworkable duty. [FN10] In a related context, Part IV predicts how the Texas Supreme Court will decide when faced with another duty surrounding drug laboratories, the duty to use reasonable care. [FN11] Part V acts as an introduction to the appendix which provides a survey of the trend of third party privity in Texas. [FN12] Finally, Part VI recognizes the difficulties inherent in imposing a duty to warn, but stresses the need for such a duty due to changing social conditions and the severity of wrongfully accusing an individual of drug use based on a false positive test result. [FN13]

***825** II. Statement of the Case

A. Background: Doe's Conditional Employment

In January of 1990, Jane Doe ("Doe"), [FN14] a twenty-four year old graduate student at the University of Texas Business School, was offered employment by the Quaker Oats Company ("Quaker") as a marketing assistant. [FN15] In accordance with company policy, Quaker's written employment offer was conditioned upon Doe's satisfactory completion of a pre-employment drug screening examination. [FN16] Quaker contracted with SmithKline Beecham Corporation ("SmithKline") to perform the drug test. [FN17] Quaker directed Doe to the Austin Occupational Health Center ("AOHC") where a urine specimen was taken. [FN18] Although Doe completed a medical history form on which she listed all medications recently used, Doe did not disclose, nor was she asked about, recent food intake or poppy seed consumption. [FN19] After the AOHC sent Doe's urine sample to SmithKline for testing, SmithKline reported to Quaker that the test revealed the presence of opiates [FN20] in Doe's urine. [FN21]

When Quaker advised Doe that she tested positive for opiates, Doe denied using illicit drugs and informed Quaker that several days before the test she had eaten several poppy seed muffins which must have caused her positive test results. [FN22] Quaker nevertheless withdrew Doe's offer of employment in accordance with its policy and advised ***826** her that her only recourse was to reapply for a position after six months. [FN23] When Doe reapplied, Quaker chose not to hire her. [FN24]

B. The Search for a Duty and the Final Ruling

Doe sued SmithKline for negligence, [FN25] breach of the duty of good faith and fair dealing, defamation, and tortious interference with a prospective contract. [FN26] The trial court granted summary judgment [FN27] for SmithKline on all four theories. [FN28]

***827** The Austin Court of Appeals subsequently reversed SmithKline's summary judgment as to Doe's negligence claim. [FN29] The court concluded that SmithKline failed to conclusively demonstrate that it owed no duty to Doe. The court reasoned that "[i]f a risk is foreseeable, it gives rise to a duty of reasonable care." [FN30] Furthermore, the court viewed SmithKline not merely as an innocent bystander, but rather, as a laboratory that partially created a dangerous situation. [FN31] Ultimately, the Texas Supreme Court granted SmithKline's writ of error to resolve the issue. [FN32]

In a 6-3 decision, [FN33] the Texas Supreme Court reversed the court of appeals as to the negligence claim, holding that SmithKline owed no duty to warn Quaker or Doe that eating poppy seeds could cause a positive drug test result. [FN34] The court strongly disagreed because the court of appeals never actually defined what duty SmithKline owed to Doe. [FN35] Instead, the court of appeals "held only 'that SmithKline has failed to conclusively demonstrate that it owed no

duty to Doe."' [FN36] Therefore, in defining the issue of the legal duty for which Doe argued, the Texas Supreme Court stated that "[w]hether a laboratory is responsible to persons tested for negligently performing drug tests is not the issue before us." [FN37] Doe's principal complaint was that SmithKline did not warn her and Quaker of the effects of eating poppy seeds on drug tests. [FN38] Additionally, once the court deemed this ***828** to be a duty to warn case, it further stated that "[n]o court has imposed a duty on drug testing laboratories to warn test subjects about the possible influences on results." [FN39]

III. Negligence and the SmithKline Reasoning

A. Establishing a Duty to Warn

To recover under a negligence cause of action in Texas, the plaintiff must prove: (1) the defendant owed a legal duty to the plaintiff; (2) the defendant breached that duty; (3) the breach was the proximate cause [FN40] of the resulting injury; and (4) the plaintiff suffered actual loss or damage. [FN41] Furthermore, the existence of a legal duty that the defendant owed to the plaintiff is a question of law for the court. [FN42]

In SmithKline, the Texas Supreme Court was faced with precedent when it came to recognizing an established legal duty. "Doe has not cited, and we are not aware of, a single decision of any court in the United States which recognizes the legal duty for which she argues." [FN43] Doe's complaint was essentially that SmithKline failed to warn her and Quaker of the possible effects that eating poppy seeds could likely have on drug tests. This is not, therefore, an issue of a drug laboratory's duty to use reasonable care in performing the test. After all, it is undisputed by all parties to the suit that the test was accurate--Doe did, in fact, test positive for morphine. [FN44]

In determining the existence of a legal duty, not only the law and policies of Texas are taken into account, but also "the law of other ***829** states and the United States, and the views of respected and authoritative restatements and commentators." [FN45] Thus, absent any direct authority in Texas or other states for creating a duty to warn, general tort principles are considered for guidance. [FN46] Section 551 of the Restatement (Second) of Torts recognizes a general duty to disclose facts in a commercial setting, which may have encompassed Doe's duty to warn claim. [FN47] The Texas Supreme Court, however, has only cited section 551 once and has never embraced it as a rule of law in Texas. [FN48] Furthermore, the court found that section 551 ultimately would not assist Doe because SmithKline "had no fiduciary or other similar relation of trust and confidence with Doe . . . . SmithKline made no representations to Doe whatever . . . . [And,] SmithKline had no knowledge of what Doe believed about the drug test." [FN49]

As a last resort, the court has an inherent power to recognize a new common

law duty based on "several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against ***830** the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." [FN50] It is here that flexibility lies in a negligence suit. Duty is a question-begging term, yet it is still the basic representation of whether there is to be liability. It is viewed as the "sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." [FN51] As such, the scope of duty will change as our notions of human relations do. [FN52]

The Texas Supreme Court conceded that SmithKline could, and did, foresee that a person would have a positive drug test due to having eaten poppy seeds. [FN53] However, "[f]oreseeability alone . . . is not sufficient to create a new duty." [FN54] Even where harm is foreseeable, "a mere bystander who did not create the dangerous situation is not required to become the good Samaritan and prevent injury to others." [FN55] Only where the party created the dangerous situation or where the party enjoys a special relationship [FN56] with the other party giving rise to a duty will this general rule not apply. [FN57]

Did SmithKline create a dangerous situation? [FN58] SmithKline argued to the court of appeals that it only provided raw test results and ***831** was forbidden by Illinois law [FN59] from making any interpretation of those results. [FN60] However, this was not a persuasive argument. The court of appeals believed that SmithKline was, in fact, obligated to provide sufficient information on possible test anomalies to prevent any misleading perceptions. [FN61] By providing such information, the court stated that this would not run afoul of Illinois law. [FN62] The Texas Supreme Court disagreed, though, holding that SmithKline merely performed a urinalysis and reported the presence of certain drugs or their metabolites. [FN63] Moreover, SmithKline "neither created nor controlled the use to which its test results would be put." [FN64] Difficulties remain, however, with this laissez-faire attitude towards drug laboratories. SmithKline did, in fact, perform a urinalysis and provide the raw test results. But SmithKline also went beyond this and actually created, at least in part, a dangerous situation. SmithKline assured Quaker that its test results were accurate [FN65] and Quaker relied upon ***832** these assurances. [FN66] SmithKline's promotional literature advertised that a positive finding indicated, with virtual certainty, evidence of drug use. [FN67] It necessarily follows, therefore, that a positive drug test result exclusively indicates illegal drug use to most individuals and many employers. In fact, this was Quaker's perception of drug testing. [FN68] It is also very feasible that an innocent employee or applicant may not only lose employment, but may also carry a lifelong stigma of being labeled as a drug user. [FN69] If a drug laboratory even partially creates a dangerous situation, then it is no longer a mere bystander and it must become the good Samaritan to prevent injury if it reasonably appears, or should appear, that others may be injured as a result. [FN70] SmithKline did create, at least in part, a dangerous situation and due to its relationship to those employees and prospective

employees whose urine it tests at their risk of loss of employment, SmithKline should be held responsible for failing to warn that poppy seeds can cause false positive drug test results.

B. Balancing a Known Medical Fact Against a Burdensome Duty

There are two valid, yet opposing, arguments which revolve around a duty to warn case. On one side, a test subject complains that it is a well- known fact in the medical field that a substance such as poppy seeds causes morphine to be present in the system. Therefore, to avoid being falsely accused of using drugs, lay persons should be warned of such dangers that could easily be avoided. However, on the other side, a drug laboratory argues that their test was completely accurate in detecting the presence of drugs, and that they should not be responsible for warning of any and every possible cause of positive results other than using drugs.

It is undisputed that the ingestion of poppy seeds in sufficient quantities will result in the presence of morphine and codeine in a person's urine. [FN71] Essentially, the tests cannot distinguish between an ***833** ingestion of morphine from poppy seeds and an injection of heroin, since the result for either is a true positive for morphine. [FN72] In fact, SmithKline was aware of this and knew that its test could not distinguish between poppy seed ingestion and drug use, and yet did not even convey this information to Quaker or Doe. [FN73] Furthermore, SmithKline invites employers such as Quaker to rely on its superior knowledge and resources in the area of drug testing and to rely on its test results as authoritative. [FN74] Therefore, it only seems equitable that a laboratory with superior knowledge should not make affirmative representations about the accuracy of those results in a manner that may be substantially distorted without having a duty to warn of possible false positive causes. [FN75] This is best illustrated when drastic measures are taken, as in the present case, such as immediate termination of an employee when an employer learns of her positive test results for narcotics. Thus, to provide informationeven on a general basis, drug testing laboratories would not be interpreting individual results; rather, the information would be provided to prevent any potentially misleading interpretations of test results. [FN76]

***834** Conversely, if a duty to warn is imposed, a drug laboratory would bear the responsibility and potential liability for a duty which cannot readily be defined. A duty to warn would require informing each employer and test subject of all possible causes of positive results, other than illegal drugs, which could conceivably yield a positive result. Even if a laboratory was burdened with determining all such substances, the test subject would then need to be asked about the ingestion of each substance including, but not limited to, the amount, form, and time frame in which it was taken. [FN77] This is problematic at the very least because the possibilities are endless; these substances could include anything from an over-the-counter inhaler to inhaling second-hand

marijuana smoke. [FN78] Therefore, the more substances that a test subject is questioned about, the more reasons the person will have to deny a positive drug result. [FN79] Since many substances by their very nature are legal, available, and not illicit, a test subject would have a conveniently built-in excuse for the use of illegal drugs even before being required to explain a positive result. [FN80] Furthermore, a duty to warn would require laboratories to constantly conduct expensive research to discover and warn employers and test subjects of every possible legal substance such as food, medication, liquid, inhalant, product, or chemical which may in some way affect a drug test. [FN81] For these reasons, to impose a duty to warn on drug laboratories seems both overly burdensome from an economic standpoint and virtually unworkable from a liability standpoint when it comes to actually defining the parameters of their duty.

There is no doubt that serious concerns arise in imposing a duty to warn on drug laboratories. As illustrated, both the test subjects and the drug laboratories have compelling arguments regarding the imposition of a duty to warn. Thus, there is a need for compromise. Test subjects are certainly entitled to protection from false and damaging accusations. However, limits must also be established to protect the business community from an overly litigious society. This requires ***835** that such interests be balanced to find a fair and equitable medium for both sides. The answer is not to simply deny that drug laboratories have a duty to warn test subjects that certain substances cause false positive test results. Drug laboratories must bear some responsibility when it comes to informing lay persons about such substances. A difficult issue does arise, however, in determining where to draw the line between substances which are well-known to cause false results and other substances which are too obscure or unreasonable upon which to base a duty. Ultimately, in devising a solution to define this gray area, the law should first respect the fundamental rights of the individual and, thereafter, seek to foster and protect the economic environment for our business community.

IV. A Related Context: Predicting a Duty to Use Reasonable Care

SmithKline is not the only Texas case that favors drug testing laboratories in negligence suits by test subjects. Willis v. Roche Biomedical Laboratories, Inc. [FN82] is another indication that it may be difficult for the subjects of employer-mandated drug tests to bring negligence suits against the laboratories which performed their tests. Willis also involved a false positive result, but this time caused by the test subject's ingestion of over- the-counter cold medication. An employee, whose employer ordered random drug testing of its employees, tested positive for methamphetamine use and was placed on restricted work duty and ordered to attend counseling sessions before the error was discovered. The employee sued the laboratory for negligence, and the district court granted summary judgment for the laboratory. [FN83]

The Fifth Circuit Court of Appeals handed down two opinions in Willis. [FN84] As an Erie court, the Fifth Circuit was anticipating the outcome of Texas law and agreed with the SmithKline court of appeals' basic reasoning as to the existence of the drug laboratory's duty to be quite soundly based on established Texas law. Despite SmithKline being the first reported Texas case to directly address the particular question of the duties of drug testing laboratories to testees, the Willis ***836** court stated that "the law of Texas is indeed sufficiently clear for Erie court prediction purposes on the specific issue of a drug testing laboratory's duty to testees to use reasonable care in conducting its tests." [FN85]

The Fifth Circuit soon learned, though, that SmithKline involved a duty to warn, not a duty to use reasonable care. Prior to the first Willis decision, the Texas Supreme Court had already granted a writ of error in SmithKline. [FN86] Ironically, even after the writ was granted, the Fifth Circuit proceeded to decide Willis. [FN87] The Texas Supreme Court was far from flattered when the Fifth Circuit gave little deference to the state high court's intent to review. The Texas Supreme Court, in no uncertain terms, promptly corrected the Fifth Circuit, stating:

> Willis is based solely, and erroneously, on the court of appeals' decision in the case now before us. The issues in the two cases are simply not the same. (Curiously, the Fifth Circuit did not regard this Court's having agreed to review the court of appeals' decision as relevant in evaluating its precedential value.) [FN88]

Ultimately, the Texas Supreme Court proceeded to deny Doe's negligence claim, finding that SmithKline had no duty to warn. As a direct result, the Fifth Circuit withdrew and superseded its initial opinion in Willis. [FN89] The Fifth Circuit noted that "[w]ith the benefit of a recent pronouncement from the Supreme Court of Texas, we now make the necessary Erie prediction." [FN90]

But why was Willis superseded if SmithKline involved an entirely different duty? Writing for the court, Circuit Judge Robert M. Parker [FN91] observed that SmithKline seemed to question the soundness ***837** of the decisions finding a duty to use reasonable care. [FN92] The Texas Supreme Court recognized that courts of appeals in Illinois and Louisiana have found drug laboratories to owe a duty to perform services with reasonable care, but stated that even on this issue, "the law is in a nascent stage" and "[n]o court of last resort has spoken." [FN93] Moreover, in a related context, the Texas Supreme Court noted that the only court of last resort in any American jurisdiction to clearly consider the issue of a duty to use reasonable care has held that no tort duty should be imposed on polygraph test operators. [FN94] Nevertheless, the court emphasized that negligently performing drug tests was not the issue before them. [FN95]

Essentially, all of these references by the Texas Supreme Court were only dicta. However, this dicta was persuasive enough for the Fifth Circuit to

withdraw and supersede Willis, despite involving two entirely different duties. These unfavorable references changed the outcome of Willis because the Fifth Circuit's role was to predict what the Texas Supreme Court would have done if presented with the same dispute. [FN96] In sum,

> [a]lthough the Supreme Court of Texas emphasized in SmithKline that it was not considering whether a drug testing ***838** laboratory has a duty to use reasonable care in performing tests and reporting results, we must consider what the court did say in determining what Texas law is. Recognizing the risks inherent in making an Erie "guess," we [now] find that under current Texas law, Roche [the laboratory] owed Willis [the employee] no duty of reasonable care in testing his urine for drugs. [FN97]

Whether a drug laboratory owes a duty to use reasonable care to test subjects in performing their drug tests is still, technically, an open issue in the Texas Supreme Court. Evidently, though, the Fifth Circuit is confident that Texas will continue to absolve drug laboratories when faced with this issue, despite being in direct opposition to Illinois and Louisiana law.

V. The Third Party Privity Trend in Texas

As a general rule, privity [FN98] has largely been diminished as a limitation on liability in nearly all areas of tort liability. [FN99] However, in light of recent decisions such as SmithKline and Willis, Texas seems to be resisting the adoption of relaxed privity requirements. This raises an important question for third parties: Absent privity of contract, at what point, if any, will the Texas Supreme Court recognize tort liability to a third party? As an illustration, the Appendix contains a survey of recent Texas Supreme Court cases which reflects the difficulty that third parties continue to have due to a lack of privity.

VI. Conclusion

This Note supports the recognition of new duties which are inevitable due to changing social conditions. With the abundance of drugs in our society and the increasing practice of employer-mandated drug testing, equity demands that a duty be placed on drug laboratories to warn of the causes of false positive test results. Problems arise, however, when defining the very parameters of such a duty. If a duty is ***839** imposed, laboratories would be required to inform each test subject of all possible causes of positive results other than using drugs. Therefore, it is necessary to find a medium between an unworkable duty and informing of well-known substances that cause false positive results. Ultimately, one certainty is that the risk of harm in our society to an individual because of a false positive drug test is so significant that any individual wrongfully accused of drug usage should be well within the scope of protection under the law. [FN100]

The Third Party Privity Trend in Texas

Deceptive Trade Practices Act

Amstadt v. U.S. Brass Corp., 919 S.W.2d 644 (Tex. 1996)	- DTPA is not intended to reach upstream manufacturers and suppliers when their representations are not communicated to consumers
Abbott Lab., Inc. v. Segura, 907 S.W.2d 503 (Tex. 1995)	- consumers' claims seeking damages from infant formula producers were not actionable under the DTPA where consumers were indirect purchasers
Home Sav. Ass'n v. Guerra, 733 S.W.2d 134 (Tex. 1987)	- an assignee of a retail installment contract cannot be held derivatively liable for the seller's misconduct in excess of the amount paid by the buyer under the contract

Legal Malpractice

Barcelo v. Elliott, 923 S.W.2d 575	- attorneys who o negligently draft wills or trust agreements owe no duty of care to third-party intended beneficiaries-citing Texas courts of appeals who have

(Tex. 1996)		uniformly applied the privity barrier in the estate planning context: Thomas v. Pryor, 847 S.W.2d 303 (Tex. App.--Dallas 1992), judgm't vacated by agr., 863 S.W.2d 462 (Tex. 1993); Dickey v. Jansen, 731 S.W.2d 581 (Tex. App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.); Berry v. Dodson, Nunley & Taylor, 717 S.W.2d 716 (Tex. App.--San Antonio 1986), judgm't vacated by agr., 729 S.W.2d 690 (Tex. 1987).
		Workers' Compensation
Natividad v. Alexsis, Inc., 875 S.W.2d 695 (Tex. 1994)	-	neither the adjusting firm nor its adjuster that handled claims for workers' compensation carrier owed a duty of good faith and fair dealing to an injured worker, absent contractually created 'special relationship' between the parties
		Wrongful Death
Transport Ins. Co. v. Faircloth, 898 S.W.2d 269 (Tex. 1995)	-	no 'special relationship' existed between liability insurer and a minor third-party claimant so as to impose on insurer a duty of good faith and fair dealing in negotiating a wrongful death settlement or to justify imposing a fiduciary duty on the insurer

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[FN1]. William L. Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 15 (1953).

[FN2]. SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347, 348 (Tex. 1995).

[FN3]. See Marianne Heal, Drug Testing in the Workplace: The Need for Quality Assurance Legislation, 48 Ohio St. L.J. 877, 877 (1987); David A. Miller, Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment, 48 U. Pitt. L. Rev. 201, 208, 210 (1986).

[FN4]. 903 S.W.2d at 347.

[FN5]. Id. at 348.

[FN6]. Id.

[FN7]. Id. at 353.

[FN8]. See infra notes 14-39 and accompanying text.

[FN9]. See infra notes 40-70 and accompanying text.

[FN10]. See infra notes 71-81 and accompanying text.

[FN11]. See infra notes 82-97 and accompanying text.

[FN12]. See infra notes 98-99 and accompanying text.

[FN13]. See infra note 100 and accompanying text.

[FN14]. The plaintiff's real name is contained in the record on the appeal bond and plaintiff's deposition. Respondent's Reply Brief to Petitioners' Response and Supplemental Briefs at ii, SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347 (Tex. 1995) (No. D-4131).

[FN15]. Respondent's Opposition to Application for Writ of Error of SmithKline Beecham Corp. and SmithKline Beecham Clinical Lab., Inc. at 2-3, SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347 (Tex. 1995) (No. D-4131) [[hereinafter Respondent's Writ Opposition Brief].

[FN16]. Quaker's policy stated: "Any individual whose test results are positive and who did not disclose current medications will not be eligible for hire." SmithKline, 903 S.W.2d at 348 (internal quotes omitted).

[FN17]. Id.

[FN18]. Id. at 349.

[FN19]. Doe v. SmithKline Beecham Corp., 855 S.W.2d 248, 251 n.3 (Tex. App.--Austin 1993), aff'd as modified, SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347 (Tex. 1995).

[FN20]. The term "opiate" is defined as "a medicine containing opium or a substance derived from opium, as codeine or morphine." 3 J.E. Schmidt, M.D., Attorneys' Dictionary of Medicine and Word Finder O-53 (1991). Opium is defined as "[t]he dried juice of certain parts of the poppy plant .... The chief constituents of opium are morphine, codeine, papaverine, etc. It is used chiefly as a narcotic and pain reliever. Opium and its derivatives are strongly habit forming." Id. at O-54.

[FN21]. SmithKline, 903 S.W.2d at 349.

[FN22]. After testing positive for opiates, Doe learned through her own research that eating poppy seeds can cause a drug test result to be positive for opiates. Id.

[FN23]. Id.

[FN24]. Id. When Quaker advised Doe that her drug test was positive, Doe attempted to attribute the test result to having taken Vicodin, a pain medication prescribed for her roommate. Doe later confessed to Quaker that she had not taken Vicodin and that she lied because she was "under extreme duress" and "completely, essentially out of [her] mind." Id. (internal quotes omitted). When Doe reapplied, Quaker refused to hire her on the grounds that she had lied

about taking Vicodin. Id.

[FN25]. The negligence allegations were as follows:
(1) Failing to inform plaintiff before she undertook the urinalysis drug test that poppy seeds are a known cause of positive test results and could lead to her failing the drug test.
(2) Failing to inform prospective employers and/or test recipients that poppy seeds are a known cause of positive test results and could lead to a positive test result for opiate use.
(3) Failing to instruct plaintiff that, because poppy seeds can alter a drug test result, to abstain from eating poppy seeds or disclose this fact to any defendant.
(4) Failing to inquire about whether the plaintiff ingested any poppy seed foods within a reasonable period before her urinalysis test was administered as poppy seeds are a known cause of positive test results.
(5) Failing to report the level of opiates found in plaintiff's urine test and failing to inform third persons, including plaintiff's prospective employer, that this level was consistent with poppy seed ingestion and not illicit drug use.
(6) Failing to conduct a review of plaintiff's drug test results to inquire, detect, and determine if plaintiff's positive result was consistent with the ingestion of poppy seeds.
(7) Failing to return the plaintiff's drug sample after the test was performed.
Id. at 350-51.

[FN26]. Id. at 350. This Note focuses exclusively on the relationship between the SmithKline laboratory and Doe, the person tested. However, Doe also brought suit against Quaker and the AOHC. The AOHC was dismissed on May 23, 1991, after discovery revealed that it was merely the repository for the urine. Respondent's Writ Opposition Brief, supra note 15, at 4 n.6. While the case was pending in the Texas Supreme Court, Quaker and Doe settled. Id.

[FN27]. The standards for reviewing a motion for summary judgment are:
1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.
Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985).

[FN28]. SmithKline, 903 S.W.2d at 350.

[FN29]. Id. The focus of this Note is on Doe's negligence claim against SmithKline. However, the court of appeals also reversed SmithKline's summary judgment as to Doe's tortious interference with a prospective contract claim. Ultimately, the Texas Supreme Court agreed with the court of appeals that SmithKline failed to establish its right to summary judgment on Doe's tortious interference claim, thereby remanding the case for further proceedings. Id. at 355-56.

[FN30]. Doe v. SmithKline Beecham Corp., 855 S.W.2d 248, 251 n.3 (Tex. App.--Austin 1993), aff'd as modified, SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347 (Tex. 1995).

[FN31]. Id.

[FN32]. SmithKline, 903 S.W.2d at 350.

[FN33]. Justice Hecht delivered the opinion of the Court, in which Chief Justice Phillips and Justices Gonzalez, Cornyn, Enoch, and Owen joined. Id. at 348. Justice Gammage was joined by Justices Hightower and Spector, dissenting. Id. at 356.

[FN34]. Id. at 354.

[FN35]. Id. at 351.

[FN36]. Id. (quoting Doe, 855 S.W.2d at 256).

[FN37]. Id. at 351.

[FN38]. The Texas Supreme Court restated Doe's principal complaint as:
> SmithKline should have warned her or Quaker, either through dissemination of information, specific instruction or inquiry, how eating poppy seeds might affect a person's drug test. Doe also complains that in reporting her test result[,] SmithKline should have recognized and attempted to determine the effect that eating poppy seeds might have had, and that SmithKline should have returned her urine specimen to her.

Id.

[FN39]. Id. at 351-52.

[FN40]. "Proximate cause consists of cause-in-fact and foreseeability." El Chico Corp. v. Poole, 732 S.W.2d 306, 313 (Tex. 1987) (citing Exxon Corp. v. Quinn, 726 S.W.2d 17, 21 (Tex. 1987)). "Cause-in-fact is 'but for cause,' meaning [that] the negligent act or omission [must be] a substantial factor in bringing about the injury and without which no harm would have been incurred." Id. (quoting Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 549 (Tex. 1985)). "Foreseeability ... means [that] the actor as a person of ordinary intelligence should have anticipated the dangers his negligent act creates for others." Id. (citing Nixon, 690 S.W.2d at 549-50). "Foreseeability does not require the actor [to] anticipate the particular accident, but only that he reasonably anticipate the general character of the injury." Id. (citing Nixon, 690 S.W.2d at 550).

[FN41]. See Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 312 (Tex. 1983).

[FN42]. See Centeq Realty v. Siegler, 899 S.W.2d 195, 197 (Tex. 1995); Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994); Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990); Otis Eng'g Corp., 668 S.W.2d at 309 (citing Abalos v. Oil Dev. Co., 544 S.W.2d 627, 631 (Tex. 1976)).

[FN43]. SmithKline, 903 S.W.2d at 351.

[FN44]. Application for Writ of Error of Petitioners SmithKline Beecham Corp. and SmithKline Beecham Clinical Lab., Inc. at 4-5, SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347 (Tex. 1995) (No. D-4131) [hereinafter Petitioners' Writ Application].

[FN45]. SmithKline, 903 S.W.2d at 351.

[FN46]. Id. at 352. The Texas Supreme Court looked to section 551 of the Restatement (Second) of Torts which states:

1. One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

2. One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or

misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Restatement (Second) of Torts § 551 (1977).

[FN47]. In his dissent, Justice Gammage disagreed, stating that "[s]ection 551, by its context and express terms, is meant to apply only to commercial and business transactions that do not fit the employment drug testing context." SmithKline, 903 S.W.2d at 358 (Gammage, J., dissenting).

[FN48]. SmithKline, 903 S.W.2d at 352; see Smith v. National Resort Communities, 585 S.W.2d 655, 658 (Tex. 1979).

[FN49]. SmithKline, 903 S.W.2d at 352-53 (internal quotes omitted).

[FN50]. Id. at 353 (quoting Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990)); see also Graff v. Beard, 858 S.W.2d 918, 920 (Tex. 1993) (applying the factors in deciding whether to impose a new common law duty); Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983) (considering the factors when the decisional law of Texas had yet to address the precise issues involved); Corbin v. Safeway Stores, 648 S.W.2d 292, 296 (Tex. 1983) (establishing the factors to prove harmful consequences resulting from particular conduct).

[FN51]. William L. Prosser, Handbook of the Law of Torts 325-26 (4th ed. 1971).

[FN52]. Prosser stated that "[i]n the decision whether or not there is a duty, manyfactors interplay: the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall." Prosser, supra note 1, at 15.

[FN53]. SmithKline, 903 S.W.2d at 353.

[FN54]. Id. (citing Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994); Boyles v. Kerr, 855 S.W.2d 593, 599 (Tex. 1993)). But see Greater Houston Transp. Co., 801 S.W.2d at 525 (stating that foreseeability of the risk is the foremost and dominant consideration); cf. El Chico Corp. v. Poole, 732 S.W.2d 306, 312 (Tex. 1987) (stating that if a risk is foreseeable, it gives rise to a duty of reasonable

care).

[FN55]. Buchanan v. Rose, 159 S.W.2d 109, 110 (Tex. 1942).

[FN56]. Early notions of duty evolved from the recognition of some special relationship between the parties, such as common carrier/passenger, bailor/bailee, landowner/invitee, or parties to a contract. See Percy H. Winfield, Duty in Tortious Negligence, 34 Colum. L. Rev. 41, 44-46 (1934).

[FN57]. See El Chico, 732 S.W.2d at 312; Otis Eng'g Corp. v. Clark, 668 S.W.2d 301, 309 (Tex. 1983); Buchanan, 159 S.W.2d at 110.

[FN58]. The term "create" is defined to mean "to bring into existence," "to bring about by a course of action or behavior," or "to cause or occasion." Webster's Third New International Dictionary 532 (4th ed. 1976).

[FN59]. Respondents SmithKline Beecham Corporation and SmithKline Beecham Clinical Laboratories, Inc. are incorporated in Illinois and therefore must adhere to Illinois law. The applicable Illinois statute states:

> The result of a test shall be reported directly to the licensed physician or other authorized person who requested it. A report of results issued from a clinical laboratory shall show clearly the name of the laboratory, address of the laboratory, and name of the director of that clinical laboratory as they appear on the last license or permit application. No interpretation, diagnosis or prognosis or suggested treatment shall appear on the laboratory report form except that a report made by a physician licensed to practice medicine in Illinois, or a dentist licensed in Illinois, may include such information.

210 Ill. Comp. Stat. Ann. 25/7-102 (West 1993).

[FN60]. Doe v. SmithKline Beecham Corp., 855 S.W.2d 248, 251 n.3 (Tex. App.--Austin 1993), aff'd as modified, SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347 (Tex. 1995).

[FN61]. Id. at 257.

[FN62]. Id.

[FN63]. SmithKline, 903 S.W.2d at 353.

[FN64]. Id.

[FN65]. At one time, SmithKline's advertising brochure contained the following statement:

Although most laboratories can offer some form of drug testing at what seems like a good price, the hallmark of a responsible, quality-conscious laboratory is its ability to offer a complete testing system, a system that focuses not only on the assays themselves, but on each transaction in the drug-testing process. [SmithKline] has designed a comprehensive drug-testing system that extends from specimen pickup by our own specially trained couriers through proper reporting of results and long-term retention of test records. What this simply means is that a positive result from [SmithKline] can be accepted with virtual certainty as evidence of drug use.

Id. at 348-49 (emphasis added).

SmithKline's advertising materials no longer contain the quoted passage, but do state: "A confirmed positive result offers virtually 100 percent assurance that the specified drug is actually present in the urine specimen." Id. at 349. SmithKline later revised its promotional materials to state: "In addition, certain types of poppy seeds, if consumed in sufficient quantity, can produce a positive result for opiates. Since the drug contained in these seeds (in minute quantity) is related to the opiates used by drug offenders, there is no way to completely eliminate this potential problem." Id.

[FN66]. See id. at 348.

[FN67]. See supra note 65 and accompanying text.

[FN68]. SmithKline, 903 S.W.2d at 348.

[FN69]. See Heal, supra note 3, at 878.

[FN70]. See Buchanan v. Rose, 159 S.W.2d 109, 110 (Tex. 1942) (enunciating the postulates underlying a duty to act).

[FN71]. SmithKline, 903 S.W.2d at 349; see also Kjell Bjerver et al., Morphine Intake from Poppy Seed Food, 34 J. Pharmacy Pharmacology 798, 798 (1982) (consuming one to two helpings of poppy seed cake a few hours before a urine test can cause a positive finding of morphine); Giselher Fritschi & William R. Prescott, Jr., Morphine Levels in Urine Subsequent to Poppy Seed Consumption, 27 Forensic Sci. Int'l 111, 116 (1985) (eating three helpings of poppy seed cake can possibly raise urinary morphine levels of up to 5 ug/ml); Lyle W. Hayes et al., Concentrations of Morphine and Codeine in Serum and Urine after Ingestion of

Poppy Seeds, 33 Clinical Chemistry 806, 806 (1987) (ingesting one or two servings of poppy seed cake causes a positive result for urinary opiate of several days' duration); Bruce C. Pettitt et al., Opiates in Poppy Seed: Effect on Urinalysis Results After Consumption of Poppy Seed Cake-Filling, 33 Clinical Chemistry 1251, 1251 (1987) (consuming one-fifth of amount of poppy seed filling produces significant opiate concentrations in urine); Richard E. Struempler, Excretion of Morphine in Urine Following the Ingestion of Poppy Seeds, 153 Mil. Med. 468, 468-69 (1988) (eating roast beef sandwiches served on poppy seed buns caused positive results for urinary morphine in 19 out of 66 naval recruits).

[FN72]. David J. Hanson, Drug Abuse Testing Programs Gaining Acceptance in Workplace, Chem. & Eng'g News, June 2, 1986, at 11.

[FN73]. SmithKline, 903 S.W.2d at 349-50.

[FN74]. See supra note 65 and accompanying text.

[FN75]. At this point, it is necessary to address a lingering question: What about a negligent misrepresentation cause of action? Doe, however, did not plead misrepresentation. The Texas Supreme Court found no such claim included in Doe's seven specific negligence allegations. SmithKline, 903 S.W.2d at 354; see supra note 25 and accompanying text. As a rule, pleadings are not given an overly strict reading and "[a] court should uphold the petition as to a cause of action that may be reasonably inferred from what is specifically stated, even if an element of the cause of action is not specifically alleged." SmithKline, 903 S.W.2d at 354 (quoting Boyles v. Kerr, 855 S.W.2d 593, 601 (Tex. 1993)). However, the court opined that there was simply no reasonable way to read Doe's allegations as giving fair and adequate notice of a claim for negligent misrepresentation. Id. at 355.

[FN76]. Doe v. SmithKline Beecham Corp., 855 S.W.2d 248, 251 n.3 (Tex. App.--Austin 1993), aff'd as modified, SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347 (Tex. 1995).

[FN77]. Factors such as amount, form, and time frame necessarily affect the levels of substances registering as positive for narcotics. See generally Hala N. ElSohly et al., Poppy Seed Ingestion and Opiates Urinalysis: A Closer Look, 14 J. Analytical Toxicology 308, 308 (1990) (designing a study to correlate the amount of poppy seeds ingested with the urinary concentration of total morphine as a function of time); Hayes et al., supra note 71, at 806 (eating one or two servings of poppy seed cake can cause a positive result for urinary opiate of several days' duration).

[FN78]. SmithKline, 903 S.W.2d at 353-54.

[FN79]. Id. at 354.

[FN80]. Petitioners' Writ Application, supra note 44, at 14.

[FN81]. Id. at 15.

[FN82]. 61 F.3d 313 (5th Cir. 1995). Willis was initiated in Texas state court and was removed to federal district court.

[FN83]. Willis v. Roche Biomedical Lab., Inc., No. CIV.A.H-91-2360, 1992 WL 532638, at *1 (S.D. Tex. July 1, 1992).

[FN84]. The first opinion was decided on June 6, 1994. Willis v. Roche Biomedical Lab., Inc., 21 F.3d 1368 (5th Cir. 1994). The second opinion, which superseded the first, was decided on August 2, 1995. Willis v. Roche Biomedical Lab., Inc., 61 F.3d 313 (5th Cir. 1995).

[FN85]. Willis, 21 F.3d at 1372.

[FN86]. Id. at 1374.

[FN87]. The Fifth Circuit stated:

> Opinions of the Texas Courts of Appeal are 'indicia of state law,' which should be followed by the federal courts sitting as Erie courts absent a 'strong showing that the state supreme court would rule differently.' And the fact that the Texas Supreme Court has granted a writ of error in SmithKline, and thus will review this case, does notrepresent such a 'strong showing that the state supreme court w[ill] rule differently [from the SmithKline Texas Court of Appeals].'

Id. (quoting Lavespere v. Niagara Mach. & Tool Works, Inc., 920 F.2d 259, 260 (5th Cir. 1990)).

[FN88]. SmithKline, 903 S.W.2d at 352.

[FN89]. Willis, 61 F.3d at 313.

[FN90]. Id. at 315.

[FN91]. Robert M. Parker wrote the first Willis decision as the Chief Judge of the Eastern District of Texas, sitting by designation at the time the case was submitted. At the time he wrote the second Willis opinion withdrawing and superseding the first, he was sitting as Circuit Judge.

[FN92]. Willis, 61 F.3d at 316.

[FN93]. SmithKline, 903 S.W.2d at 352; see also Stinson v. Physicians Immediate Care, Ltd., 646 N.E.2d 930, 932-34 (Ill. App. Ct. 1995) (finding that laboratory owes prospective employee a duty not to contaminate sample and report a false result); Nehrenz v. Dunn, 593 So. 2d 915, 917-18 (La. Ct. App. 1992) (stating that laboratory owes employee a duty to perform test in a competent manner); Lewis v. Aluminum Co. of Am., 588 So. 2d 167, 170 (La. Ct. App. 1991) (mandating that laboratory owes employee a duty to perform test in a competent, non-negligent manner); Elliott v. Laboratory Specialists, Inc., 588 So. 2d 175, 176 (La. Ct. App. 1991) (concluding that laboratory owes employee a duty to perform test in a scientifically reasonable manner).

[FN94]. SmithKline, 903 S.W.2d at 352; see Hall v. United Parcel Serv. of Am., 555 N.E.2d 273, 276-78 (N.Y. 1990). But see Mechanics Lumber Co. v. Smith, 752 S.W.2d 763, 765 (Ark. 1988) (reversing negligence summary judgment, thereby revealing that polygraph testing can raise a duty for a negligence action); Ellis v. Buckley, 790 P.2d 875, 877 (Colo. Ct. App. 1989) (affirming employee's negligence claim against polygraph examiner); Lawson v. Howmet Aluminum Corp., 449 N.E.2d 1172, 1177 (Ind. Ct. App. 1983) (holding that polygraph examiner owed duty of care to employee in administering examination); Lewis v. Rodriguez, 759 P.2d 1012, 1016 (N.M. Ct. App. 1988) (opining that polygraphers were professionals subject to malpractice standard of care); Zampatori v. United Parcel Serv., 479 N.Y.S.2d 470, 473-74 (Sup. Ct. 1984) (stating that a duty to act with care is imposed by law). See generally Claudia G. Catalano, Annotation, Employee's Action in Tort Against Party Administering Polygraph, Drug, or Similar Test at Request of Actual or Prospective Employer, 89 A.L.R. 4th 527, § 3 at 540-45 (1991 & Supp. 1994) (stating that in the limited number of jurisdictions where the polygraph issue has arisen, more states have recognized a cause of action than have rejected it).

[FN95]. SmithKline, 903 S.W.2d at 351.

[FN96]. Willis, 61 F.3d at 316 n.2.

[FN97]. Id. at 316.

[FN98]. Privity of contract is defined as:
That connection or relationship which exists between two or more contracting parties. It was traditionally essential to the maintenance of an action on any

contract that there should subsist such privity between the plaintiff and defendant in respect of the matter sued on. However, the absence of privity as a defense in actions for damages in contract and tort actions is generally no longer viable with the enactment of warranty statutes, acceptance by states of [the] doctrine of strict liability, and court decisions which have extended the right to sue for injuries or damages to third party beneficiaries, and even innocent bystanders.
Black's Law Dictionary 1199 (6th ed. 1990).

[FN99]. See, e.g., W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 93, at 667-68, § 96, at 681-83 (5th ed. 1984).

[FN100]. Willis v. Roche Biomedical Lab., Inc., 21 F.3d 1368, 1374 (5th Cir. 1994) (citing Elliott v. Laboratory Specialists, Inc., 588 So. 2d 175, 176 (La. Ct. App. 1991)).

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