ORAL ARGUMENT – 1/30/03
01-0292
MISSION PETROLEUM V. SOLOMON

GUNN: I want to begin by stating the issue or more precisely stating the clash over the issues. You see in the briefs each side has framed issue one over duty in their own way, which is fair game for advocacy. I want to address, however, two factual assertions that are inserted into the respondent's statement of the issue.

The respondent's statement of the issue asserts factually that drug test results are automatically reported to the entire relevant industry, and that they could cause mandatory termination.

Let me clarify the state of the record and of the law on that, because you may find it significant to your duty analysis. There is no automatic reporting. In fact it's just the opposite. Reporting is forbidden without employee consent. The federal scheme makes test results absolutely confidential and it's the right of the employee only to release those.

I want to cite to you to the specific regs on that. In 49 CFR 382.405(f) and 382.413. The regs are always a moving target because the federal government is constantly revising them.

PHILLIPS: Within the company how many people were told about Mr. Solomon's test results?

GUNN: It was very limited. My recollection is 1 or 2. It's fairly small. The regs do govern who is entitled to get that. There's a person, I think it's called a DER, who is the designated employee representative who gets that. And then the DER sends an instruction down the chain about what has to be done with that employee.

JEFFERSON: Under the regulation what were the terms of the employee's obligation?

GUNN: Defendant's ex. 12 and 13 are specific written authorizations from Mr. Solomon that he took to other companies where he signed a very detailed form citing to those regs and saying, I want you with my consent to go back to my old employer and get this data. I also refer you Justice Jefferson to the record, to vol. 2 of the reporter's record, pages 186 and 197, where Mr. Solomon testifies to the same thing. It's not just our exhibit. He agrees when he went to the two follow-up companies that he authorized them to go get...

PHILLIPS: They don't hire anybody without them as a matter of their own policy which they are not prohibited to doing under the law?

GUNN: Hiring is completely left to them. And the federal law is basically neutral about hiring in employment policy. Now that second company does have federal constraints on who can work in safety sensitive positions. And that's the same with Mission, with our company.

JEFFERSON: Well the second regulation that you mentioned 413, says that the employer shall pursuant to the driver's written authorization inquire about verified positive controlled substance results.

GUNN: Yes. So the new employer for example when he goes to MCX or to Coastal if they want to hire him for a safety sensitive position like driving a truck, they must ask him and then he has a choice...

JEFFERSON: _____ real choice?

GUNN: It's obviously tilted because of market reasons.

JEFFERSON: Because he says, I'm not going to tell you, and you can't get my test results. Do you think he is going to be hired?

GUNN: I think it's unlikely.

ENOCH: Let's assume it's voluntary. Let's assume that I go apply to another job and they want references and I gave them my employer. And they call my employer and my employer tells them something that is false. Would it make any difference whether the employer was required to convey information or whether the employer volunteered information? If the information is false when they conveyed it, whether it was required to convey it or not convey it, what difference does it make to the employer's liability?

GUNN: I think that's absolutely the right question. That would go into the calculus of defamation law. That is what this claim is. It has nothing to do with negligence. Negligence should not be in this case. That is a defamation fact that could be crucial. The employer could argue privilege. He could argue culpability and say, well under the applicable law, I'm liable for negligence but it was just an honest mistake. There has to be a showing of recklessness. Then the employee can come back and rebut privileges by showing abuse, such as malice and so on.

ENOCH: Your concern here is what's basically being asked for is some sort of cause of action based on negligent conveying information?

GUNN: That's correct. And the cause of action is defamation. In fact, that's the way this case was pleaded originally: solely as defamation.

HANKINSON: And what was the grounds for the summary judgment motion that caused that claim to fail?

GUNN: We moved on 4 grounds: truth, privilege, consent and I think on the basis that the federal regs required us to do that. The plaintiff responded by moving for a continuance and saying, I want to add two new causes of action before you hear this. I want to add negligence and business disparagement. These are so similar, you should hold off and have a summary judgment hearing all at once. The trial judge did that, and he then gave us a letter ruling, which is in the supplemental clerk's record, that says, here's my view of all of your theories. I am granting summary judgment on defamation because I think you consented to it. I think you authorized it. I am granting summary judgment.

HANKINSON: Authorized the taking of the test to begin with, or authorizing the release of the information?

GUNN: The release of the information. And the judge made the same ruling on the business disparagement claim, but then let negligence go forward to trial. At the end of the trial when we tried to shoot down the mental anguish damages arguing Douglas v. _____ type of rationale that an economic loss rule barred them. In our jnov motion, the plaintiff came back and said, no, judge, you should allow that because it's so analogous to defamation. You could get these damages for mental anguish under defamation.

HANKINSON: What I'm having a hard time with is given the defenses that you asserted to the defamation action and given the way this regulatory scheme works. I understand that you say the cause of action is not for negligence. It's for defamation. But I have a hard time imagining how an employee could ever prevail or even get a defamation case to the jury given the nature of the regulation and the reality of the employment market place.

GUNN: It seems to me that we don't really know, because they didn't bring that up. They have business disparagement...

HANKINSON: But you've taken the position and one reason why you argue that we should not intrude in on the principles that that _____ employment is because we need not worry about that, that the employees will be taken care of over here in the defamation camp. But I'm having a hard time given the regulatory scheme and the realities of the employment market with drug testing and all of that kind of thing, like Justice Jefferson said, does the employee have a real choice or not, how a defamation action really could be maintained or whether it would ever be viable.

GUNN: I think if there is a problem in defamation law, the way to deal with it is to adjust defamation law. I think that could be thought out and the employee could say, no this is not true because it contains an implication that I'm a drug user, and you did not act with sufficient care in disseminating the information that you've abused the privilege.

HANKINSON: Let's look at the reality. There's the drug test. I failed it. It was improperly administered as your client, as I understand it, concede that the procedures surrounding this particular test...

GUNN: I do not concede that. I concede only that there's some evidence.

HANKINSON: There is some evidence that they didn't follow the procedures appropriately. I go apply for another job and I say, you know I'm not going to consent to the release of that information; therefore, I'm never the same, but also I never get a job. Basically, then, I don't have a cause of action. The harm's still be done to me if I never let you release the information. If I do let you release it, then I've consented and you get me there. Gotcha.

GUNN: But the gotcha works both ways. We are in a bad gotcha situation if we have a fellow with a bad test result. We cannot keep him on the road, and it is not incurable to get the mark off the record.

HANKINSON: And I agree with that. I understand the federal regs are designed to protect the public. But given the employee's circumstance, it seems to me that the employee needs to be in a position where in fact they can be assured that the test is going to be reliable and that in fact all the appropriate protections surrounding them consenting to doing the test are going to be followed, so that the testing process is fair given that the consequences are so serious.

GUNN: It's conceivable that there may be a claim under state law that the consent is ineffective because it's done under duress, or something like that. And that could be litigated to a jury. But we have no way out if we get this result. We don't want a negligent entrustment suit against us or a negligent hiring suit against us. We have a problem. The firing can't be the basis of the complaint.

HANKINSON: And your opponent says that we're not complaining about the firing. I understand that there's a debate among the two of you about that. But they say that that's not the basis. And so if we understand from a policy perspective the difficult situation the employer is in, how do we balance that against the difficult situation that the employee finds himself in?

GUNN: A person is not unhirable. Let me speak to the way the regs work. Getting somebody back to duty. The regs want you to be checked out by an SAP, substance abuse professional. And getting cleared by an SAP is adequate. So the next company can hire somebody if he can persuade them - I think the testing conditions were lousy and the test result is unreliable, then they can say, alright I'll take you, I'm required to clear you through an SAP before I can just treat you like everybody else. You take 6 drug screens in the first 12 months, and you have the SAP sign off: yes, this person is okay and I've talked with him, whatever rehab I think is appropriate has been taken care of.

O'NEILL: Again, that's rehab. That presumes that the test was valid in the first instance. Let me change the line of questioning here. If I go to a drug testing company, and submit myself to a drug test and they mishandle it, they don't follow the regulations required to conduct the test, can I sue the drug company?

GUNN: For what tort?

O'NEILL: For negligently performing the test, not following the regulations.

GUNN: I would want to know what the damages are.

O'NEILL: Assuming I can prove damages. Is there a duty there?

GUNN: In other words, the unanswered question from Smith Cline basically: does the lab have a general negligence duty?

O'NEILL: Right. Well Smith Cline was more of a failure to warn case.

GUNN: Correct. But there was that larger duty question that wasn't in the case.

O'NEILL: I mean, why wouldn't there be a duty there. If I go to them and they botched the test, and get a wrong result, why don't they owe me a duty to perform the test at least within the federal standards, or the DOT standards?

GUNN: The courts nationally are split on that right down the middle.

O'NEILL: Well presume there is a duty in that situation. Why wouldn't that duty then evolve to the employer who decides to conduct the test himself?

GUNN: The duty does not have to be a negligence duty. It could be a _____ type contractual duty of care. It could be a warranty.

O'NEILL: My question is, if there is a duty directly on the drug testing company to follow these regulations, if the employer decides to take on that responsibility himself, why doesn't that duty apply to him as a tester as well as opposed to as an employer. I mean at that point he is wearing two hats: I'm your drug tester; I'm your employer. Why wouldn't that same duty that would apply to the drug tester apply in that situation?

GUNN: It seems to me the answer is the border wars problem of crashing causes of action into each other, and essentially upsetting the balance that defamation law strikes. If defamation law has a problem that should be litigated as a defamation case and not packaged as negligence.

O'NEILL: Again, if I go to the drug company and they botch the test and don't follow the guidelines, that's straight negligence.

GUNN: I don't necessarily agree. It depends on what the harm is. If they don't diagnose your ear infection, yes. But if it's just that the result gets out to some third party who

doesn't hire you, that is reputational business disparagement, §623(a) stuff. I do not see that as negligence.

O'NEILL: Well presuming there is a negligence cause of action there. Let's say that this employer requires me to go get an independent test and I have to go do that myself. When they report it to my potential employer, and I can prove that they didn't hire me because of this botched test, and let's presume the facts of this case, that Mr. Salomon went to an independent drug company who botched the test and reported to the employer. And presuming I can show damages there and presuming we fall within those jurisdictions that allow a negligence cause of action there, again why wouldn't that same duty apply to the employer who is wearing two hats?

GUNN: The employer has a stronger position because of the at will doctrine, and the preference for free mobility and for the ability to hire and fire. And if you let the cat out of the bag on that hypothetical, I think there is no stopping to the negligent investigation theory generally. For a Title 7 investigation: I come back from lunch today and the receptionist and the copy boy are in an argument, saying the other is harassing the other person, then I have to do not a mandatory but a highly recommended title 7 investigation. And if I get it wrong and somebody can get on the stand and say, well I've got evidence, you did it wrong, you didn't interview enough people, then I am cooked and I'm in a no win position. It is very easy for a plaintiff to come back and say, they botched the test, they didn't collect it right. We deny that. We absolutely deny that. In fact finding inaccuracy is a legitimate policy justification for saying, I don't think I want to open up this negligence tort. I will do it as defamation, and if the injury is reputational, I don't need a redundant cause of action on top of that.

O'NEILL: So if the employer decides to take this on himself we're excusing any sort of negligence that would go from a drug tester to an employee?

GUNN: No. We are making an actionable defamation. A traditional defamation.

PHILLIPS: But you've already _____ to win that case, because it's not punitive to enough people, to anybody that doesn't need to know to make a firing. And assume nobody else wants _____.

GUNN: That may be so, but that sounds to me like an objection to the law of defamation to say it's not good enough.

ENOCH: Well in a sense it sometimes refer to the tort claims being gap fillers when there isn't a cause of action that takes care of this circumstance. So it seems to me that's an answer to your question whether you go fix defamation law. No. We sometimes say since the definition doesn't cover that but this is a real harm, then we create some cause of action that's a gap filler.

GUNN: You have the power to do that. Most states have not done that. I believe it would be quite a minority position to do that. And the reason most states have rejected it is they just

find it doctrinally inconsistent with at will, because once you start then you have all negligent investigation theories all at once. And they've just made a policy determination at will is a preferable - at will is harsh rule, but that is just the nature of the beast.

OWEN: But were those decided in the context of termination claims?

GUNN: I believe many of them are.

OWEN: That's the difference here. He's not claiming that you can't fire him because of this. He concedes that you could fire him. He's claiming that because of that negligence, I can't get a job anywhere else.

GUNN: That is correct.

OWEN: Which is a different claim.

GUNN: I think it is. I think it should be analyzed as a defamation claim as you did in Cain v. Hearst where you abolished the false _____.

OWEN: Let's suppose this had been an outside testing company and they had botched the test. He got fired from his present job, and his present employer dissimulated this information on the DOT computer. Does he have a cause of action against the testing company, not for getting fired, but for botching the test knowing that that information was going to be dissimulated. Not for defamation but just for negligence in not taking care to conduct the test properly knowing that it would be dissimulated.

GUNN: Not for defamation?

OWEN: Not for defamation.

GUNN: I don't know. I would assume it would be 623(a) business disparagement.

HANKINSON: You have briefed the law in other jurisdictions that have taken the position that your view is in the majority. My question is, not having read all of those cases but just looking at your synopsis of them, are any of those cases like this one where there is an alleged botched drug test and the claim is not damages arising from the termination, but from the inability to get employment elsewhere?

GUNN: I believe the Graham case from the 8th circuit is that way. I will check my cases.

HANKINSON: Most of them seem to me to be more general: we're not going to do negligent investigation in this context, or they turned on the fact that termination was the complaint of

consequence of the employer's action.

GUNN: That may be so. I would stress and you ask you to check the record carefully on the mental anguish damages, because those are all linked to the termination.

HANKINSON: I just want to understand. When you say that we would be in the minority in terms of what has gone on elsewhere, I didn't see a lot of cases that were just like this one. And I just wanted to know if that's your view that you've really taken a broader sweep in terms of the at will employment doctrine with the law that you've cited to us. And at this point in time you can only think of one case that is really on point with this one.

GUNN: That's correct.

JEFFERSON: Let's assume the commission didn't have a policy to terminate employees that tested positive for drug use. But they nevertheless posted the results, and the employee then is damaged. Maybe he was moonlighting at another job and was fired from that job because of that. And assume that the testing was negligent. Are you saying that the only cause of action the employee has against the employer in that instance is defamation, period?

GUNN: Defamation and business disparagement.

JEFFERSON: So negligence is simply - even if you could show that a reasonably prudent employer would have conducted the test with better guidelines and in compliance with federal regulations and that their failure to conduct the test in that manner proximately caused damages, that the only cause of action is defamation?

GUNN: I would say that's right because the cure would be worse than the disease. Because people take jobs seriously, and you will have these swearing contests a lot more often. There will be no way out for me. I will be sued if I do fire somebody, and then I can be sued if I don't. That's why.

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RESPONDENT

LAWYER: The reason why this is not a defamation case is because defamation cases are centered on communications. And here what we've got is a negligent act which set a chain of reactions that led to the communication that led to the harm. But it wasn't the communication itself. It was the negligent testing that started this chain of events.

JEFFERSON: Couldn't an employer have a policy that says something like this: We don't mind being negligent. Our policy is going to be anybody that fails this test for whatever reason, we don't care what the reason is, if they test positive they are going to be terminated. Even if we're negligent in conducting that test. Isn't that an employer's prerogative under the at will doctrine?

LAWYER: Absolutely.

JEFFERSON: So isn't everything here really about the communication and not about the testing?

LAWYER: The damage flows from the communication. That's right. But the communication was directly caused by the negligent acts. And there is no remedy in defamation for this clear harm. When an employer communicates information to another it's subject to a qualified privilege you have to prove that that employer knew it was false, or had actual serious doubts about its truth. And in this case their negligence led to what came out as a positive drug test. They didn't realize that. All they had was a piece of paper that said the guy flunked the test. And when that happens, federal law mandates a couple of things. First of all, the positive result automatically means the driver can no longer drive a truck until they go and take a lot of remedial actions. In this case, Mission decided to fire him instead of doing that. And that's fine. That was their right. What if they hadn't fired him? What if they had kept him on as you mentioned? Any other person who wanted to hire him as a truck driver is required by federal law to find out what his test results were. And they are going to find out. So he is precluded from ever working as a truck driver again until somebody is willing to take him on and put him through rehab, which is as a practical matter not going to happen.

So the harm here is that he didn't just lose his job. He lost the ability for him to perform his trade and his trade was a truck driver. And Mission says that they don't owe a duty to prevent that harm. And they don't owe a duty to simply follow the rules that are mandated by the gov't in how you conduct these tests.

RODRIGUEZ: Let me give you a hypothetical. Let's say this was a sexual harassment investigation and a male is accused of sexually harassing a female employee. An investigation is conducted, the male is terminated, he's an at will employee, he now brings suit that he should not have been terminated and there was a negligent investigation of that sexual harassment investigation. Does he have a cause of action?

LAWYER: No, he shouldn't. He's only suing about losing his job, which he can't do.

RODRIGUEZ: Let's claim he's suffered mental anguish damages as a result of the investigation, and as a result now the termination.

LAWYER: I still don't think he's got a cause of action.

RODRIGUEZ: How do we distinguish these two cases then?

LAWYER: On a number of ways. One is it's the automatic things that happen after this test happens, which is automatically he has to go...

RODRIGUEZ: Well as a practical reality though if he publishes to his prospective employers that he was discharged as a result of a sexual harassment investigation, the same effect applies: he's not going to get employment.

LAWYER: That's true. As a practical matter there may be some of that too. But sexual harassment investigations you're never really sure. You can tell the future employer, look you know it wasn't my fault. In this case your future employer can't put you on the road as a truck driver period.

OWEN: Let's say I'm discharged. My company runs a drug test on me. They don't do it properly. They say I'm a drug user and they discharge me. Then I go to the next employer and that employer says why were you discharged. And I say, well my former employer says I use drugs, but I disagree. The test was negligent. But every employer I go to asks me the question and I truthfully say I was discharged because of drug use. Now do I have a cause of action against my former employer because I can't get a job anywhere? You know, they are not disseminating it. They may have been negligent. But I'm asked and I have to truthfully answer. Do I have a cause of action against my former employer?

LAWYER: I'm not sure because it's a little bit different from this case for a couple of reasons. One is, is if you were a truck driver you couldn't drive. And that's mandated by the federal government.

OWEN: Let's say a lawyer. I've got a law firm and I say we don't hire drug users. We are not going to hire you. And they can if they want to. I'm not prohibited from practicing law. But they say we're not going to hire you.

LAWYER: There might be something there if this is what happened. If it was your former employer who put on that hat of a clinic or a lab and did the test themselves.

OWEN: Or a clinic or a lab. Can I sue someone for running the test? They were negligent. And the test was improperly run. It had a positive when it should have had a negative. They don't publish that to anyone. They don't tell anyone that, but they fire you. Then prospective employers ask me every single time: why were you fired? I tell them. Does that give me a cause of action because either the drug testing company or it was my employer who tested me, do I have a cause of action?

LAWYER: Against the tester if it was reasonably foreseeable that this was going to happen, I think the answer might be yes. And that very question of the person who does the testing, whether it's the lab or the employer, was left open in Smith Kline. But I have to tell the court that since this argument was scheduled, I have looked at the law and the jurisdictions are not split on this issue. The entity who does the actual testing, whether they owe a duty to the person they are testing has been addressed in 8 different jurisdictions other than ours. And in every single one of those jurisdictions where the action was as to the testing, not about what you needed to communicate in

connection with it, but just the test itself, every single one said those labs owed a duty.

There is one exception and this is important. There is one exception, and that's Texas. Because in reaction to the Smith Kline opinion, the 5th circuit withdrew its opinion in Willis v. Roush(?). Issued a new opinion at 61 F.3d 313 saying we thought there was a duty of the lab but we've read Smith Kline and we're going to take an eerie guess at what the court in Texas would do, and we guessed that the lab owes no duty whatsoever. This opinion by the 5th circuit has been attached somewhat. My criticism of it is this. They did no analysis whatsoever.

O'NEILL: Well help us with an analysis. Obviously the court is having trouble drawing lines because the at will doctrine is a pretty strong doctrine in Texas. And we don't want to put the employer in this sort of Hopson's(?) choice. If you were going to draw the rule how would you differentiate between a sexual harassment case for example and a situation where the employer takes on the responsibility to test itself and doesn't follow its manuals would you distinguish it based upon regulations that are out there on the employee manual? How could you draw a narrow opinion here that would not impinge upon the at will doctrine?

LAWYER: Very easily. And there is two answers to that question. One is, how do you analyze it? And I would suggest that this issue whether it be an employer or a lab needs this court to analyze it applying the six factors from Greater Houston Transportation. This issue desperately needs a thoughtful analysis. How you distinguish this case, this situation from that is in several ways. In an at will situation the investigations are normally done solely on behalf of the employer. Here the investigation is not just done for the employer. In fact this particular employer wasn't keen to do this. It is required to do it by federal law. And it's doing it not only on its own behalf but on all other prospective employers who are required to get those results before they hire a truck driver.

O'NEILL: So you base the distinctions on a federal scheme that requires this information?

LAWYER: That's one factor. I think that factors in, and it makes this very different. The actual test itself is not a subjective investigation. Employers need freedom to evaluate their employees, to do sexual harassment investigations. They need that subjective freedom and the freedom to hire and fire. In this case it was purely objective. It was just pouring urine into cups and sending it off and keeping the chain of custody right, keeping the facility clean, keeping the ____ clean, keeping people from being able to swap out samples. Following clearly set rules and more importantly once those test results come out positive, nobody ever questions them. It's over. The driver doesn't have an opportunity to clear his name. It is automatic: a positive test result; all these things happen. Everybody assumes once it comes back from the lab and has been verified by the doctor, that's in fact what happened. That's not true in other cases. That's what makes this testing business so draconian and so hard to get around.

JEFFERSON: Where is the evidence that Mission's negligence actually caused all of these damages?

LAWYER: Nobody is challenging the actual damages that flowed from the report that he was unable to work as a truck driver...

JEFFERSON: What is the evidence linking the negligence to positive or the inaccurate, invalid test results?

LAWYER: The contaminated sample. And that is something that Mission has raised in this case and that is, the evidence that we have showing proximate cause. Now proximate cause is two elements: one is foreseeability which was established with direct evidence; cause and fact is the other part of that test. We had to establish that was circumstantial evidence. And here's what the evidence was. First of all, of course this court knows you have to look at the evidence that only favors the jury's verdict and that evidence was this. Mr. Solomon did not smoke marijuana. His specimen should have tested negative. At the other end of the spectrum, the testing lab what they got for Mr. Solomon tested positive. Now that leaves what happened at Mission. And the evidence showed that the trucking terminal at Mission was an accident waiting to happen.

Now there were several things that were brought out about that. Mission says that we're supposed to prove the exact mechanism of how that sample got contaminated. That's not Texas law. Texas law only requires that you show that the accident happened. It was more probable that the accident happened because of the negligence of the defendant. And in this case that's what the evidence showed. And there are a lot of cases by this court on that. One in particular I find very helpful and that is the Farley v. MM Cattle Co. In that case, a young cowboy got thrown off of his horse while he was out riding, herding calves. The evidence showed nobody knew how his horse fell. His horse fell and he was thrown and hurt. What the evidence did show was that either the horse was the cause of the accident or the inexperience of the cowboy was the cause of the accident. And the court said, there were all other possibilities too. Like maybe the calf was acting up. Maybe there were holes in the field. Whatever. The court said all you have to do is show that the greater probability is that one of those two things caused the accident and since both of those things were under the control of the employer that's enough to prove liability.

Another interesting thing about the Farley case is that there was lots of testimony about the horse. The horse's name was Crowbar. Crowbar was a very bad cow horse. He should not have been out there. I think that is kind of interesting because that's kind of aligned with the evidence in this case because just as the young cowboy put his fate in the hands of a horse, the wrong horse, Mr. Solomon put his fate, his future as a truck driver in the hands of the wrong person.

JEFFERSON: So you say that the evidence shows that Solomon was framed by Mission or what is the more probable inference we're to draw from the evidence?

LAWYER: The evidence viewed in favor of the verdict about Mr. Hildebrandt is the following. First of all, the DOT testing protocol is you're not supposed to have a direct supervisor take the sample because they have a motive, an incentive to make the test go one way or the other.

So there was a violation there. Second, Mr. Hildebrandt was serving 10 years probation for a second degree felony. He was subject to drug testing on his own. He testified that when he went to his probation office to give samples that they were very sloppy, which means that it would have been easy for him to swap the sample out. Now as an aside, I have to say that in Mission's brief they talk about why that's impossible. And they use evidence that this court is not supposed to consider. The evidence in favor of the verdict is this: nobody paid attention to the chain of custody. The actual specimens were left out of site of the person who gave it all the time. Nobody paid any attention to that. Second, the temperature strip. Mission claims well it would have been too complicated. Mr. Hildebrandt would have had to find a warm sample. There was testimony that nobody paid any attention to the temperature strips. In fact Mr. Solomon specifically said I didn't notice the temperature strip. Mr. Solomon also said it would have been easy for Mr. Hildebrandt to swap it out.

And there is one more factor about Mr. Hildebrand that the jury was entitled to consider, and I think it's important. In a word, Mr. Hildebrandt was a liar. He was fired for lying to a customer and his testimony about the testing procedures every step of the way, each step was flatly contradicted by three witnesses who were there. So the jury was entitled to look at this man and go...

ENOCH: Let's assume that you connect up the sample to whatever the results are and you can get to the element of negligence and you can get to a jury on that. It still looks to me like it's a defamation claim. The reason he can't get a job is because information is being conveyed that the prospective employer reacts to. I can't get a job because I'm now thought of as being a drug user. And that seems to me that's defamation. Is the real problem with why you crafted it this way because Texas doesn't recognize negligent defamation or if Texas recognizes negligent defamation why isn't that your claim?

LAWYER: Texas does not preclude someone for recovering damages to reputation via communication through some other cause of action. And in this case it would just be a simple negligent cause of action. Because again it was the act...

ENOCH: Well we don't allow the negligent infliction of emotional distress so you can't get mental anguish just because somebody negligently inflicts emotional stress. In defamation does it matter whether you know the information you're conveying is false or not as to whether you're liable if the reputation damage that you cause has actually been caused?

LAWYER: First of all, there is a privilege. You have to know is false before you can be held liable in this context.

ENOCH: And there is no evidence here that they knew it was false when they were conveying?

LAWYER: Right.

ENOCH: If there had been evidence that they knew it was false when they were conveying it wouldn't you have a defamation claim here against the employer? Doesn't the privilege disappear, and if they knew it was false and they conveyed it don't you have a claim against the employer?

LAWYER: I think you would. But in this case, for example, what if your law license got jerked negligently and there were no communications. Just basically there was an automatic thing that happened. I guess they would have to post it. But it would be not the posting of that information that would hurt you. It's the fact that your license got taken away. What was taken away here was his ability to practice his trade. And the mechanism by which that happened did involve some communications, but those communications were automatic and there's no remedy for those communications in defamation law.

O'NEILL: Would this case fit a negligent undertaking theory?

LAWYER: By negligent undertaking, do you mean the voluntary kind of thing?

O'NEILL: Yeah. I mean they are not under any duty to conduct these tests and once they take on this duty to conduct this test, they then -we've got some authority on that and I just wonder if we're trying to put this in a compartment...

LAWYER: The CA did that I think. They said it was kind of a negligent undertaking deal. In that case the way that worked was, the cleaner way to do it the way I see it is to not say that well they took it upon themselves do something and in so doing they created this danger. I just think the simple way is they put on the hat of a tester. And a tester has a duty to use reasonable care for all of these reasons.

HANKINSON: Earlier in answer to one of Justice O'Neill's questions, she was asking you how we could accept your theory of imposing a duty in this particular circumstance without abrogating the at will employment doctrine. And you gave I counted 3 reasons, and I would just like to know if that was your complete list or if there were other things you wanted us to consider? I think you mentioned the investigation was for the employers that benefit typically. It's not the case here. The actual test is not subjective. Here it's objective and that no one ever questions positive test results in these circumstances.

LAWYER: And the last one is he's not suing for wrongful termination. I know that's a label issue, but he's not. The evidence was that he could have gone out and gotten a truck driver job somewhere else with the same pay. In a wrongful termination case, you're suing for what you lost vis a vis that job. Here he lost his ability to practice his trade. And that's what takes this out of an employment at will type of case.

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REBUTTAL

O'NEILL: If you were drawing up this list, because you're here to protect the employer, and let's say that there is a negligence duty and you want to write it so that there is liability in that situation, but you want to make sure it doesn't go any further than the very narrow situation you can draw, what if anything would you add to the list that opposing counsel has given us.

GUNN: I'm really not sure. I don't know how to open up this door and keep it just cracked. I cannot see it stopping.

O'NEILL: Do you want to address any of the specific suggestions that she has? Because this seems fairly limited. I mean she said in a situation where there is a federal scheme in place. There can't be too many situations like that.

GUNN: What kind of reason is that? I don't understand the significance of the federal scheme. That's no different from a state scheme or a common law rule. The law is the law whether it's federal or state. I don't see that as a meaningful distinction. I don't understand the Title 7 distinction. I do not find it persuasive that this can be distinguished from a Title 7 case. What I hear is the sound of the resurrection of the false light(?) tort. What I hear is a distortion of defamation law. The New York Times standard is not applicable here. This is not a public official or public figure case. Negligence is the standard.

O'NEILL: When you bring up Title 7, an employer cannot fire an employee for a discriminatory reason, right?

GUNN: Correct.

O'NEILL: At will doesn't protect that.

GUNN: Correct.

O'NEILL: Wouldn't that fit within her scheme?

GUNN: The Title 7 problem is doing an investigation to find out if there's a hostile work environment or if a supervisor has harassed somebody.

O'NEILL: But that would come within her objective/subjective test. That would protect all those situations.

GUNN: I don't understand why that is - I don't see the distinction between objective and subjective. What we have here is Mr. Solomon's word for what happened, and we have our people testifying to the contrary...

O'NEILL: No. Objective/Subjective meaning that the outcome of the test. I mean it tested positive. That's something that's not subject to debate.

GUNN: I don't know why it's not subject to debate. It seems to me they can criticize the lab and say it must be wrong. I didn't smoke it. I don't know what happened. It must be wrong. And we could say we don't want this fight. I don't want to get sued. I don't want you here. Or I want you to go to rehab.

I want to answer your undertaking question. I want to make clear. They have disclaimed that in the briefs...

O'NEILL: I understand that they didn't _____fact were predicate and they didn't make that claim here. But I wonder would that cover it as you claim your disparagement cause of action?

GUNN: It would not, not as it's classically been framed. Section 323 in the Restatement sections talk about physical harm and property damage for undertakings. There's not a general background rule of negligence whenever you undertake something. Because if there is, then it is not semantically difficult to frame every case as an undertaking case. You give me a firing. I will find a way to frame it as an undertaking case and say, well you didn't have to think about firing me, but you did, and you did it negligently.

HANKINSON: One of the reasons that you say we need to make sure that we keep the barrier up to protect the at will employment doctrine in this contest is particularly because these regulations are designed to protect the public and they further set safety of the public. Why wouldn't imposing a duty of reasonable care upon an employer who chooses to be a tester, why wouldn't that further public safety because we have an interest in making sure that these tests are conducted properly and in accordance with the regulations? I mean in this instance it happened to come out with a positive result. But it seems to me if you cut the other way if the duty of reasonable care is not followed and we would get a negative result, in fact then an employee had been using drugs and then we have it. So why isn't the purpose that underlies this whole scheme furthered by imposing a duty of reasonable care on anyone who decides to put the tester hat on?

GUNN: I might well have that duty to the person who gets run over, to the victim who gets hit. I'm not disputing that duty. If I bungle the drug collection process, and my trucker goes off drunk into the 18 wheeler and runs over a little girl when school is out, I am not here denying that duty. I am saying that that's a different case from the relationship we've got contractually on the job and the reputational issue that we have with third parties. So I'm not denying that that duty exists. And you can promote that duty if you like. I don't contest that.

Justice Jefferson you asked about causation, and I would like to address that. I want to make clear this is speculation on causation. And let me stress three facts. Metabolite is not marijuana. I think that's probably clear from the briefing. But don't imagine that just because there may be marijuana residue in the environment that turns into Metabolite. Second, non-blue water will not cause marijuana Metabolite to show up. It won't cause a false positive. It may cause a false negative as we just talked about. And finally, it's the plaintiff's burden to show how this can

happen. It is not enough to say, well I didn't do it, you must have done it if it's not feasible. And I would ask you to consider the aids virus as an example. The aids virus we now know is very difficult to transmit, to pick up from causal contact. The transmission mechanism has to be much more direct.

We don't know about marijuana Metabolite. From this record you know nothing about how much it takes to turn a sample positive, how much is likely to be there. The ease of getting around. We have absolutely no idea. That is the plaintiff's responsibility to prove that causal link. And you will find nothing about it. They are just speculating about sample switching and there was zero evidence of that.

O'NEILL: Would the plaintiff here have a cause of action based on breach of contract for not following the employee manual on procedures that would be followed?

GUNN: The plaintiff did sue on breach of contract, and abandoned it. I think depending on how the manual is written it could be. As you know, manuals can be written in a way to take somebody out of an at will backdrop. And if the manual makes that part of the employment bargain, then that absolutely can be actionable. That's just not pursued here.