

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 1130

COREY WILLIAMS

VERSUS

GULF COAST OCCUPATIONAL MEDICINE, INC.,  
ABC INSURANCE COMPANY, JANE DOE, DRUG TEST, INC. D/B/A DISA INC.,  
DEF INSURANCE COMPANY, PSYCHEMEDICS CORPORATION, AND  
GHI INSURANCE COMPANY

Judgment rendered FEB. 26 2016

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Appealed from the  
23rd Judicial District Court  
in and for the Parish of Ascension, Louisiana  
Trial Court No. 102,898  
Honorable Katherine "Tess" Stromberg, Judge<sup>1</sup>

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**BEFORE: PETTIGREW, HIGGINBOTHAM, AND CRAIN, JJ.**

*Higginbotham, J. concurs.*  
*Crain, J. concurs.*

<sup>1</sup> We note that, although the Honorable Guy Holdridge presided over the hearings concerning the motion for summary judgment at issue herein and rendered judgments thereon with oral reasons in open court, the judgments were actually signed thereafter by the Honorable Katherine "Tess" Stromberg, who was elected to fill Judge Holdridge's seat on the Twenty-Third Judicial District Court after he was elected to serve on this court. Judge Stromberg presided over the hearing on plaintiff's motion for new trial and rendered judgment thereon, with oral reasons at the hearing, and signed that judgment on May 8, 2015.

**PETTIGREW, J.**

The plaintiff, Corey Williams (Mr. Williams), appeals a summary judgment granted in favor of the defendant, Gulf Coast Occupational Medicine, Inc. (Gulf Coast), the company that collected a routine drug test sample of him, required by his employer. Mr. Williams alleged that his hair sample, which tested positive for cocaine, had been negligently taken by Gulf Coast's employee and Gulf Coast breached its duty to follow its own policies, designed to ensure the integrity of drug test samples. The summary judgment dismissed Mr. Williams' claims against Gulf Coast, after the district court found Mr. Williams failed to show that he could prove any negligence on the part of Gulf Coast. After a thorough *do novo* review of the record, we find a genuine issue of material fact remains regarding a portion of Mr. Williams' claims; therefore, the district court erred in granting summary judgment as to those claims. We affirm in part, reverse in part, and remand for further proceedings.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

At the time of the drug test at issue and since approximately the year 2000, Mr. Williams (a trained mechanic who worked for various oil and chemical refineries), had been employed by Starcon International (Starcon), a company that maintains an office in Gonzales. Mr. Williams had worked for Starcon, in California, at facilities including Chevron, Shell, Conoco Phillips, and Valero. On October 17, 2011, Mr. Williams and several other Starcon employees were required to undergo a routine drug screening before embarking on a new mechanical job at one of Starcon's client's refineries in Kentucky.<sup>2</sup> The employees were sent to Gulf Coast, in Gonzales, a collection site for drug screenings, to submit samples for testing. The screenings performed that day consisted of a breathalyzer test, a urine screening, and a hair sample. The samples were packaged

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<sup>2</sup> The evidence reveals that during his approximate fifteen years of employment with Starcon, Mr. Williams was required to undergo numerous urine tests, both pre-employment screenings as well as on-the-job random urine screenings. Mr. Williams testified that all of those tests had resulted in negative findings, and that the October 17, 2011 screening was the first time he was also required to submit a hair sample, and the first time he had ever tested positive on a drug screening test.

and sent to the laboratories of Psychemedics Corporation, a testing facility located in California.

Mr. Williams' hair sample, collected by Gulf Coast and tested by Psychemedics, resulted in a positive finding for cocaine and cocaine metabolites.<sup>3</sup> The confirmed positive test result was then sent by Psychemedics to the Medical Review Officer's department at Drugtest, Inc. d/b/a DISA, Inc., where it was put on record for Mr. Williams.

Following his screening, Mr. Williams had traveled to Kentucky, and after putting in one day's work at the new job there, he received a phone call from a DISA representative notifying him of the positive result for cocaine from his hair sample. According to DISA, a phone call is made to inform the person tested of a positive test result and, also, to attempt to eliminate any potential medical explanation or other alternative legitimate reason for a positive result. After speaking with Mr. Williams, who denied ever having used cocaine, but finding no other legitimate explanation for the positive test result, DISA then notified Starcon, as Mr. Williams' requesting employer, of the positive test result. As a result, Mr. Williams' employment with Starcon was terminated, and he returned to California. Mr. Williams alleges that the positive test result on file at DISA has not only caused his termination, but has also prevented him from being able to obtain work in his field.

On February 27, 2012, Mr. Williams filed a petition for damages alleging that Gulf Coast breached its duty to ensure the integrity of the hair sample collected from his forearm, by failing to ensure the sample was properly collected and not subject to contamination. Mr. Williams also asserted claims against two other named defendants, Psychemedics and DISA. However, the claims against Psychemedics were dismissed with prejudice, by summary judgment granted in its favor, dated May 15, 2014. DISA also filed a motion for summary judgment, and a hearing thereon was held on August 6, 2014,

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<sup>3</sup> The record further reveals that when a hair sample initially tests positive at Psychemedics, it is presumed positive, but then subjected to a vigorous washing procedure and re-analyzed using different testing technology and equipment. The vigorous washing procedure is designed specifically to eliminate outside contamination of a hair sample. If the hair sample, again, tests positive, it is further reviewed and confirmed positive by a certifying scientist. Once confirmed, the positive result is sent to DISA for reporting purposes.

following which Mr. Williams and DISA settled the matter between them. The record contains an order, dated May 11, 2015, granting Mr. Williams' motion to dismiss with prejudice for all claims against DISA, leaving Gulf Coast as the sole remaining defendant.

Gulf Coast also filed a motion for summary judgment. A hearing was held on September 15, 2014, following which the district court granted Gulf Coast's motion and dismissed Mr. Williams' claims against it with prejudice, in a judgment dated February 18, 2015. On March 2, 2015, Mr. Williams filed a motion for a new trial. Following a hearing on April 22, 2015, the motion was denied in a judgment rendered and signed on May 8, 2015. This devolutive appeal by Mr. Williams, of the February 18, 2015 summary judgment granted in favor of Gulf Coast, followed.

### **THE APPEAL**

On appeal, Mr. Williams contends the evidence presented at the hearing on Gulf Coast's motion for summary judgment reflects that the sole genuine issue of material fact -- whether the hair sample that was collected on October 17, 2011, and which tested positive for cocaine, can be forensically tied to Mr. Williams -- remains unresolved, and therefore, summary judgment was improper. He asserts the following three assignments of error:

1. The Trial Court erred in finding no genuine issues of material fact.
2. The Trial Court erred in weighing the evidence in a summary judgment proceeding.
3. The Trial Court erred in making inadvertent credibility determinations in a summary judgment proceeding.

### **APPLICABLE LAW**

Mr. Williams' claims against Gulf Coast are rooted in negligence. He alleged in his petition that an unnamed Gulf Coast employee (Jane Doe, later revealed to be Hannah Townsend) negligently performed a drug test using a hair sample from him. Specifically, he alleged that in collecting the sample, she acted in contravention of Gulf Coast's own company policy by "dropping a portion of [his] hair sample onto a table, using her bare hand to sweep the hair, along with any other particulate on the table, into the testing capsule, and then sending the contaminated sample for testing." Thus, Mr. Williams

alleged Ms. Townsend, as Gulf Coast's employee/collector, was negligent in the following specified failures: to properly collect the sample; to maintain cleanliness of the hair sample; to maintain the integrity of the drug test; to follow company policy and procedure; and, generally, to maintain the standard of care required under like circumstances. As to Gulf Coast, in addition to alleging it too failed in the above particulars, Mr. Williams alleged that Gulf Coast also failed to properly train and/or monitor employees.

### **NEGLIGENCE/DUTY-RISK ANALYSIS**

Louisiana courts have adopted a duty-risk analysis in determining whether to impose liability under general negligence principles. La. C.C. art. 2315, **Lemann v. Essen Lane Daiquiris, Inc.**, 2005-1095 (La. 3/10/06), 923 So.2d 627, 632-633. For liability to attach under a duty-risk analysis, a plaintiff must prove: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant failed to conform his conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) actual damages (the damages element). A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability. **Catania ex rel. Catania v. Stephens**, 2014-1294, 2015 WL 1228521 \*11 (La. App. 1 Cir. 3/17/15)(unpublished), writs denied, 2015-0734 and 2015-0735 (La. 6/1/15), 171 So.3d 933, 934. Therefore, as shown below, to carry the burden on summary judgment, Gulf Coast was required to show an absence of factual support for any of the foregoing elements of Mr. Williams' negligence cause of action.

### **SUMMARY JUDGMENT**

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. **Berard v. L-3 Communications Vertex Aerospace, LLC**, 2009-1202 (La. App. 1 Cir. 2/12/10), 35 So.3d 334, 339-340, writ denied, 2010-0715 (La. 6/4/10), 38 So.3d 302. The summary

judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of nondomestic civil actions. La. C.C.P. art. 966(A)(2).<sup>4</sup> Its purpose is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. **Hines v. Garrett**, 2004-0806 (La. 6/25/04), 876 So.2d 764, 769. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966(C)(2); **Janney v. Pearce**, 2009-2103 (La. App. 1 Cir. 5/7/10), 40 So.3d 285, 288-289, writ denied, 2010-1356 (La. 9/24/10), 45 So.3d 1078. In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. Because the applicable substantive law determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Clark v.**

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<sup>4</sup> Louisiana Code of Civil Procedure article 966 was amended and reenacted by Acts 2015, No. 422, § 1, with an effective date of January 1, 2016. The amended version of article 966 does not apply to any motion for summary judgment pending adjudication or appeal on the effective date of the Act; therefore, we refer to the former version of the article in this case. See Acts 2015, No. 422, § § 2 and 3.

**J-H-J Inc.**, 2013-0432 (La. App. 1 Cir. 11/1/13), 136 So.3d 815, 817, writ denied, 2013-2780 (La. 2/14/14), 132 So.3d 964.

A genuine issue is a triable issue. More precisely, an issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 751. A fact is material when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. *Id.* Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. **Edwards v. Dolgencorp, LLC**, 2015-0850, 2015WL9436149 \*2 (La. App. 1 Cir. 12/23/15)(unpublished opinion.)

#### **APPLICATION OF LAW/ANALYSIS**

In this case, Gulf Coast, the mover on the motion for summary judgment, does not bear the ultimate burden of proof at a trial on the merits; the burden of proving the five essential elements of the negligence claim at trial is Mr. Williams. As such, to obtain summary judgment, Gulf Coast is not charged with negating all essential elements of Mr. Williams' cause of action in negligence against it. Rather, Gulf Coast need only point out the absence of factual support for one or more elements essential to Mr. Williams' case. It is only if and when the mover points out the absence of factual support for an essential element of the plaintiff's claim that the burden ever shifts. La. C.C.P. art. 966(C)(2).

After a thorough *de novo* review of the record before us, and for the following reasons, we find that Gulf Coast, as the mover, and based on the evidence presented, failed to meet its initial burden of proving the lack of factual support for one of the essential elements of Mr. Williams' cause of action. Indeed, the evidence submitted in support of and in opposition to the summary judgment reveals the existence of a genuine issue of material fact, *to wit*, whether the hair sample taken from Mr. Williams on

October 17, 2011, was collected in such a way that ensured the integrity of the sample and ensured that the sample submitted was in fact Mr. Williams' hair. We do find that the evidence presented was sufficient to show that Mr. Williams will not be able to show the existence of a genuine issue of material fact as to whether the hair sample was free from contamination. As explained below, the evidence presented by Gulf Coast eliminated the possibility that Mr. Williams would be able to prove that element of his claims, and summary judgment as to the claim that the hair sample was contaminated was proper. However, we find the evidence submitted by Gulf Coast insufficient to establish the lack of a factual basis for the essential elements of Mr. Williams' remaining claims; thus, the burden never shifted, and summary judgment as to all other claims was improper.

#### **EVIDENCE PRESENTED / *DE NOVO* REVIEW**

In support of its motion for summary judgment, in addition to a memorandum setting forth its arguments, Gulf Coast introduced and relied on the following evidence: excerpts of Mr. Williams' deposition (together with the pertinent exhibits attached thereto), the affidavit of Thomas Cairns, the document custodian and senior scientific advisor for Psychemedics, and the expert report of Carl M. Selavka, together with pertinent exhibits attached thereto.

Essentially, Gulf Coast argued summary judgment was proper as the evidence it presented revealed that Mr. Williams failed to establish that he would be able to meet his burden of proving three elements essential to his claims: the standard of care (duty) owed by Gulf Coast, a breach by Gulf Coast of any standard of care, or that any act by Gulf Coast was the cause-in-fact of this alleged damages.<sup>5</sup>

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<sup>5</sup> Although Gulf Coast argued the plaintiff's failure to establish a duty owed by it, the plaintiff responded in opposition to the motion for summary judgment with a copy of Gulf Coast's own admission, in answers to interrogatories, that it had a detailed policy in place governing the collection of drug test hair samples. The policy provided by Gulf Coast requires the following:

Before any sample is collected, the person giving the sample must sign-in, submit a picture ID, and complete certain paperwork including a consent form. Upon completion of the aforementioned paperwork, a sterile kit is opened and used for the purpose of collecting the sample. A clean, single-use drape is laid over the collection area. The collection scissors are then cleaned and sterilized with alcohol in front of the person giving the sample. A hair sample is then obtained using the sterile scissors. The hair sample is then placed in to a cardboard envelope, it is sealed, the person marks it with their own initials to show that it was sealed in their presence and is their specimen, and it is placed in a Ziploc bag. All of



### **Mr. Williams' Deposition Testimony**

Gulf Coast relied on excerpts of Mr. Williams' deposition testimony in which he testified that he voluntarily submitted a specimen for testing, and that he initialed the drug test custody and control form verifying that the specimen submitted and placed in the envelope was his and that he witnessed the employee seal the sample in an envelope. Gulf Coast also relies on Mr. Williams' testimony that he did not object or voice any concerns on the date of the testing regarding the method by which his hair sample was collected. However, our review of the relevant excerpts of Mr. Williams' testimony reveals that he explained that at the time the sample was taken, he did not feel any need to be concerned or to protest, since he does not do drugs and had no reason to think the test might come back positive.<sup>6</sup> According to Mr. Williams, he did not even consider the possibility that the sample might not have been his hair, or that his sample might have been contaminated until he was informed of the positive test result. Mr. Williams testified that upon receiving that information, and because he knew he did not do drugs, he immediately concluded that his sample had either been contaminated or that the sample tested belonged to someone else. According to Mr. Williams, that would be the only rational explanation for the positive cocaine result.

Gulf Coast also relies on Mr. Williams' testimony that he did not see any other matter on the table that might have been inadvertently swept into the same envelope as his hair sample. However, our review of the deposition testimony reveals that Mr. Williams, when asked if he saw any other matter on the table at the time the collector

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these functions are performed in front of the person giving the sample. The Ziploc bag containing the sample is then placed into a FedEx package to be sent to the testing laboratory. The single-use drape is then discarded.

On appeal, Gulf Coast no longer contends that Mr. Williams failed to establish a standard of care applicable to Gulf Coast and that Mr. Williams could not prove that Gulf Coast owed him a duty; apparently, that issue has been abandoned in this appeal. Gulf Coast now contends only that Mr. Williams cannot prove that Gulf Coast contaminated or switched his hair sample, and also that he cannot prove that any act on the part of Gulf Coast was a cause-in-fact of his alleged injuries.

<sup>6</sup> We recognize that Mr. Williams admitted during his deposition testimony that he had used marijuana approximately ten years prior, for a period of about three months, however, he also testified that he decided to quit because the risk of getting caught in a positive urine screen and losing his job was too great.

was picking up his hair sample, did not actually say that he did not; his response was “[n]ot that I could see.” Moreover, Mr. Williams’ testimony provided specific facts about how the sample was collected from which it could be easily inferred that other matter, besides Mr. Williams’ hair, was or had landed on the table, and could have been swept up together with his hair sample.

Mr. Williams testified that after giving a urine sample, Ms. Townsend approached the table at which he was seated to collect the hair sample. Ms. Townsend was not wearing any gloves or other protective hand covering. Because his head was shaved closely and he did not have enough underarm hair, Mr. Williams testified Ms. Townsend decided to take his hair sample from his forearms. According to Mr. Williams, Ms. Townsend then picked up a blue razor, that was opened (unpackaged) and on the table near where they were seated, and without wiping the razor with alcohol or otherwise sterilizing it, she proceeded to shave some hair from both of his forearms. Mr. Williams further testified that the hair shaved from his arms then fell onto a piece of paper that contained writing on it that was beneath his arm on the table. (He specifically denied that there was a disposable drape on the table to catch the hair samples, as required by Gulf Coast’s own procedures.) According to Mr. Williams, some of the shaved hair fell on the table outside of the piece of paper, and Ms. Townsend collected those stray hairs by pressing down on them with her index finger and then using her thumb to knock them onto the piece of paper with the other hair samples. Ms. Townsend then folded the piece of paper such that when she tilted it at an angle, the hair would “slide” down the sheet of paper onto some aluminum foil. In the process of so doing, Mr. Williams observed that some hair again landed on the table, instead of the foil, and that, again, Ms. Townsend used her bare hands as before to press down on the fallen hairs and shake them off with her thumb onto the aluminum foil. He then observed her place the folded aluminum foil packet into an envelope (sample acquisition card) that she then sealed in his presence.

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However, he maintained those three months were the extent of his illegal drug use and maintained that he had never used cocaine.

Mr. Williams admitted that he placed his initials on the envelope as well as on the Psychomedics Forensic Drug Test Custody and Control Form, as directed by Ms. Townsend, confirming that he voluntarily provided the hair sample and that his hair sample was inside the envelope. The envelope was then placed in a plastic bag that was sealed with tamperproof tape, again, in Mr. Williams' presence. Mr. Williams further testified that no one else was present in the room when Ms. Townsend collected his hair sample.

At the district court and, also, on appeal, Gulf Coast argues that it provided evidence that none of the hair samples taken from the five other Starcon employees, who were drug tested the same day as Mr. Williams, tested positive. Thus, it maintains even if contamination of Mr. Williams' hair sample with any of those other employees had occurred, Mr. Williams' hair sample would have also tested negative. We reject this argument and find the other employees' test results irrelevant as concerns summary judgment.<sup>7</sup> Mr. Williams' deposition testimony, which was uncontroverted, provided a sufficient factual basis for establishing that the submission of a hair sample of someone other than Mr. Williams, may have occurred during the collection process. Mr. Williams did not allege that the alleged faulty collection of his sample involved contamination with or misidentification with the hair samples of the other five employees. The factual basis provided by Mr. Williams' account of the collection process leaves open the possibility of several other ways the hair sample submitted may have belonged to someone other than Mr. Williams, and other than his five co-workers tested that same day.

Gulf Coast also relies on the results of a drug test taken by Mr. Williams and voluntarily arranged by him following the positive results from Gulf Coast's testing in support of its position. We reject the evidence as well as Gulf Coast's arguments regarding such, as any subsequent testing or results thereof are wholly irrelevant to Mr.

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<sup>7</sup> Although this evidence may be deemed proper to present to the fact-finder at a trial on the merits, where it can be weighed accordingly, we find it is not significant probative evidence as this summary judgment level.

Williams' claims of negligence against Gulf Coast in the collection of his sample on October 17, 2011.

We also find the other evidence relied on by Gulf Coast to be either misplaced, or insufficient to meet its burden of pointing out that Mr. Williams lacks factual support for an essential element of his claim of negligence, i.e., that the collection process did not protect or ensure the integrity of his hair sample.

**Affidavit of Thomas Cairns/Expert Witness Statement of Carl M. Selavka, Ph.D.**

In support of its motion for summary judgment, Gulf Coast attached an affidavit and an expert witness statement that had been earlier submitted by Psychemedics in support of its own motion. At the outset, we note that the claims asserted by Mr. Williams are separate and distinct claims as to each defendant. To that extent, as explained below, we find Gulf Coast's reliance on evidence submitted regarding the alleged negligence of the other defendants is misplaced, given that the claims against them are based on separate and distinct allegations and factual bases.

Thomas Cairns, the document custodian and senior scientific advisor for Psychemedics, attested to the integrity of the procedures employed by Psychemedics in conducting hair analysis for drugs on samples that it has been provided by collectors, such as Gulf Coast. To the extent that Mr. Williams alleged that the sample submitted may not have been his sample, the affidavit is wholly irrelevant to the alleged negligence of Gulf Coast in the collection of Mr. Williams' hair sample. However, to the extent that Mr. Cairns attested regarding the vigorous washing procedure employed by Psychemedics, to rule out contamination once a sample has initially tested positive, we consider his attestations, as they are relevant to Mr. Williams' claims of contamination. According to Mr. Cairns, at this second stage of testing, a second portion of the hair sample is used and then "extensively washed through a multi-step procedure to effectively decontaminate the sample. ... The final wash solution is also analyzed to rule out contamination."

While we find that Mr. Cairns' testimony was sufficient to establish that Mr. Williams lacked a factual basis to support his claim that the sample submitted was

contaminated, there still remains the genuine issue of fact raised by Mr. Williams' claims against Gulf Coast as to whether for reasons still undisclosed, the hair sample that was actually submitted belonged to someone other than Mr. Williams. As noted earlier, Mr. Williams' factual account, by *uncontroverted* deposition testimony, established several possible instances in which the collection of his hair sample did not ensure its integrity. Ms. Townsend, who collected the sample, was not wearing gloves, and picked up an unwrapped razor from a nearby table and used it to shave the hair from Mr. Williams' arms. The hair was not collected by a sterile drape (as required by Gulf Coast's procedures); rather, it landed on a sheet of paper that contained writing on it, and was on the table prior to Mr. Williams submitting his sample. Further, some of the hair shaved landed on that sheet of paper, while some landed outside the paper on the table. Ms. Townsend, again without wearing gloves, collected the hairs she located on the table with her bare hands, and scooped those onto the same paper onto which Mr. Williams' hair had directly fallen. She then submitted all the contents that were on the paper into the foil packet identifying the contents thereof as Mr. Williams' hair sample.

Ms. Townsend was not deposed, and there was no other evidence submitted to rebut Mr. Williams' foregoing account of the factual basis for his claim that a genuine issue of material fact exists regarding whether the hair sample that tested positive for cocaine was actually his hair. Thus, even Mr. Cairns' attestations, undermining the claim of contamination, still do not negate, rebut, or even challenge Mr. Williams' claims that the process employed by Gulf Coast in collecting his sample may have resulted in the collection of an inadvertent hair sample being mistakenly included in the packet also containing Mr. Williams' sample.

#### **Expert Statement of Carl M. Selavka**

Gulf Coast also submitted the expert statement of Carl M. Selavka, Ph.D., essentially confirming the attestations of Mr. Cairns regarding the decontaminating effect of the vigorous washing procedure to which the hair sample provided by Mr. Williams was put. Regarding that sample, and the test results that followed, Dr. Selavka opined, "[t]he combination of the presence of Cocaine metabolites after an aggressive multi-wash

procedure, and application of aggressive wash criteria, eliminates cocaine contamination of sample collection materials or surfaces as a potential cause for the Positive Cocaine results reported on the arm hair specimen.” We reach the same conclusion as above, that to the extent that this evidence was presented by Gulf Coast to rebut the allegations of contamination, it was sufficient to support the grant of summary judgment as to the contamination element of Mr. Williams’ claim. However, it does nothing to attack the factual basis set forth by Mr. Williams that the negligent collection of his hair sample could have led to the submission of someone else’s hair sample. Albeit a lengthy and very informative report, Dr. Selavka’s statement provided therein does not address the factual basis established by Mr. Williams’ own testimony for the possibility that the hair sample was not his.

Gulf Coast also submits that proof that Mr. Williams admittedly signed the chain of custody documents, verifying that the contents therein consisted of hair samples he voluntarily allowed to be shaven from his forearms by the Gulf Coast collector and that the proper custody and control procedures were followed is sufficient to establish that Mr. Williams lacks factual support for his claims. We disagree. Mr. Williams testified that he was not worried about any positive results, that he was simply interested in complying with what he was told to do and getting the test done, so he could get to work in Kentucky. While he admitted that he signed the forms, he stated that he was just complying with what he was instructed to do. And, we note that while Mr. Williams does not deny that the foil packet contained hair sample from his arms, his testimony nonetheless provides a factual basis for the possibility that other hair samples or matter was also contained therein, and nothing that Mr. Williams signed belies that. Nor has Gulf Coast presented any evidence to the contrary.

### **CONCLUSION**

Applying the summary judgment burden of proof to this matter, for the foregoing reasons, we conclude that Gulf Coast has met its initial burden of pointing out a lack of factual support for one of Mr. Williams’ claims, that the sample submitted was contaminated. However, the evidence was insufficient to prove that Mr. Williams lacked

evidence to support his claim that the sample was negligently collected and the integrity of that sample may have been compromised by that negligence. Taking into consideration the evidence presented by Gulf Coast, the fact that Ms. Townsend, the only other person besides Mr. Williams who could provide factual testimony regarding the conditions and circumstances surrounding the collection of Mr. Williams' hair sample, was not deposed, and the lack of any other evidence to controvert Mr. Williams' testimony, a genuine issue of material fact remains, whether the hair sample submitted can be forensically tied to Mr. Williams. The factual circumstances surrounding the collection of the sample presented by Mr. Williams' uncontroverted testimony remain unrebutted and unchallenged by Gulf Coast's evidence, and are sufficient to support his cause of action in negligent collection, at this stage in the proceedings. Gulf Coast simply has not met its burden of ruling out proof of that element of Mr. Williams' claims, and summary judgment as to that portion of his claims was not proper.<sup>8</sup>

Accordingly, we affirm the partial summary judgment *only* as to the claim that his sample may have been contaminated, and reverse the judgment of the district court, which granted summary judgment in all other respects in favor of Gulf Coast Occupational Medicine, Inc., and dismissed all of Mr. Williams' claims against it. We remand the matter to the district court for further proceedings. Costs of this appeal are assessed to Gulf Coast Occupational Medicine, Inc.

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

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<sup>8</sup> For the sake of argument only, we also find that even if Gulf Coast met its initial burden such that it shifted to Mr. Williams, we find Mr. Williams met his burden of establishing factual support for the allegations in his claims against Gulf Coast, also rendering improper the granting of summary judgment in favor of Gulf Coast.