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COURT OF APPEALS

STATE OF NEW YORK

ERIC LANDON,

Respondent,

-against-

No. 142

KROLL LABORATORY SPECIALISTS, INC.,

Appellant.

20 Eagle Street
Albany, New York 12207
September 03, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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ERIC LANDON, Pro Se
Respondent

Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 142.

2 Would you like time for rebuttal?

3 MR. OCHS: Two minutes; would that be okay?

4 CHIEF JUDGE LIPPMAN: Two minutes would be
5 okay, sure. Go ahead.

6 MR. OCHS: Thank you, Judge Lippman.

7 Good afternoon. Mitchel Ochs with the law
8 firm of Anderson & Ochs in New York City, and we are
9 counsel for Kroll Laboratories, the defendant-
10 appellant in this matter.

11 I want to start with areas of agreement
12 between the parties; I think that's a good place to
13 start. And I think if you line up the briefs, both
14 sides agree that there is no existing cause of action
15 - - -

16 CHIEF JUDGE LIPPMAN: Why shouldn't there
17 be a cause of action here, counselor? Isn't - - -
18 isn't a mistake here critical to the person who's
19 being tested, particularly when their liberty is at
20 stake?

21 MR. OCHS: Well, there is a cause of
22 action; it's just not against my client, Your Honor.
23 The cause of action is against the probation
24 department.

25 CHIEF JUDGE LIPPMAN: Why shouldn't it be

1 against your client, if you make a mistake that
2 impacts the liberty of the person being tested?

3 MR. OCHS: Your Honor, you've decided
4 several months ago, in the case of Dombrowski, that
5 there's no cognizable losses on - - -

6 CHIEF JUDGE LIPPMAN: This is on all fours
7 with Dombrowski?

8 MR. OCHS: I'm pretty comfortable it's - -
9 -

10 JUDGE SMITH: Well, there is - - -

11 MR. OCHS: - - - close to it.

12 JUDGE SMITH: - - - there's some economic
13 injury here, isn't there? He claims he had to hire a
14 lawyer.

15 MR. OCHS: But that's not economic injury
16 that we recognize in the law. The only way that
17 attorney's fees are awardable are in cases where the
18 conduct and the wrong alleged is intentional.

19 JUDGE SMITH: Even - - - I mean, that's
20 generally true, that you can't get attorney's fees in
21 the case, in the very case you brought. But
22 attorney's fees are like other expenses in terms of
23 damages, aren't they?

24 MR. OCHS: No, not unless the - - - not
25 unless they can allege and prove that the wrong that

1 gave rise to the attorney's fees was an intentional
2 wrong. There is - - -

3 JUDGE SMITH: Let me ask - - - let me ask
4 you a different question.

5 MR. OCHS: Sure.

6 JUDGE SMITH: You say there's no cause of
7 action. What about defamation? Why couldn't he have
8 sued in defamation here?

9 MR. OCHS: Because defamation is - - -

10 JUDGE SMITH: Apart from the statute of
11 limitations.

12 MR. OCHS: Because the case of Hall, this
13 court decided that issue, where there is - - -

14 JUDGE SMITH: Well, what we said in Hall
15 was defamation's very tough to win. But that doesn't
16 mean he doesn't have a remedy.

17 MR. OCHS: I think what you said in Hall
18 was that - - - that - - -

19 JUDGE SMITH: You have to show malice.

20 MR. OCHS: Well, he - - - they can't - - -
21 he can't - - - he's already - - - he's already lost
22 on that front. But no, I think in Hall it was
23 narrower than that. I think what - - - what the
24 holding in Hall - - - this court's holding in Hall
25 was that defamation is not a - - - a damage

1 associated with a negligence claim.

2 CHIEF JUDGE LIPPMAN: Why isn't this case
3 different than Hall?

4 MR. OCHS: Pardon me?

5 CHIEF JUDGE LIPPMAN: Why isn't this case
6 different than Hall? Hall - - - Hall, you know,
7 wasn't a probationer, right?

8 MR. OCHS: I think this case is different
9 than Hall.

10 CHIEF JUDGE LIPPMAN: Yeah?

11 MR. OCHS: I think it's different than
12 Hall.

13 CHIEF JUDGE LIPPMAN: Yeah, and how do you
14 distinguish the two?

15 MR. OCHS: Well, on the issue of damage I
16 think it's the same; there is no cognizable
17 loss-of-freedom damage, so there was no cognizable or
18 recognizable defamation damage on the negligence
19 claim.

20 CHIEF JUDGE LIPPMAN: But your loss - - -

21 MR. OCHS: But - - -

22 CHIEF JUDGE LIPPMAN: - - - your loss of
23 freedom is at stake, can cause you all kinds of harm,
24 right, psychological harm - - -

25 MR. OCHS: Not - - -

1 CHIEF JUDGE LIPPMAN: - - - emotional harm.

2 MR. OCHS: Not compensable in negligence,

3 Your Honor. I think the law is pretty clear.

4 There's also - - -

5 CHIEF JUDGE LIPPMAN: How is the law pretty
6 clear?

7 MR. OCHS: I start with Dombrowski which
8 says that you can't recover loss of freedom damages
9 in a negligence case. I'd also submit to Your Honors
10 that there was no loss of freedom here; there was no
11 incarceration, no loss of freedom. Probation - - -

12 CHIEF JUDGE LIPPMAN: But the hearing
13 continued to go on, right, that threatened his
14 freedom?

15 MR. OCHS: But there was no loss of
16 freedom, so as a matter - - -

17 JUDGE GRAFFEO: When we consider
18 recognizing a new cause of action under a tort
19 theory, aren't we allowed to consider the societal
20 interest?

21 MR. OCHS: I think you must.

22 JUDGE GRAFFEO: I mean, isn't there an
23 important interest here in trying to encourage
24 accurate test results?

25 MR. OCHS: Well, the traditional - - - the

1 traditional indicia that the court looks to to
2 determine whether or not they want to create a new
3 cause of action in tort doesn't support that leap
4 here, Your Honor, for a number of reasons. Number
5 one is that the legislature has already entered the
6 space and has regulated my client. There are duties,
7 obligations, and in fact - - -

8 CHIEF JUDGE LIPPMAN: Your client - - -

9 MR. OCHS: - - - punishments - - -

10 CHIEF JUDGE LIPPMAN: Your client isn't
11 from the state, is it?

12 MR. OCHS: No, but licensed by the state,
13 so subject to New York - - -

14 JUDGE GRAFFEO: It's in Louisiana, correct?

15 MR. OCHS: But licensed by New York State,
16 yes, to do business here.

17 JUDGE ABDUS-SALAAM: And it has a contract
18 with New York State to do this testing, correct?

19 MR. OCHS: With the probation depart - - -
20 Orange County Probation Department.

21 JUDGE ABDUS-SALAAM: So why wouldn't this
22 case fall under Espinal or one of the exceptions?

23 MR. OCHS: Well, my understanding is
24 there's two exceptions. One is - - - to hold
25 somebody who has no privity liable in negligence,

1 there's two exceptions. One would be if the activity
2 itself was inherently dangerous - - - screening of
3 saliva is not a dangerous activity - - - or where the
4 party sought to be held accountable in negligence,
5 stands in a special relationship with the plaintiff.
6 And those are parent-child and relationships such as
7 that, which doesn't exist here. So I would submit
8 that it's - - -

9 JUDGE ABDUS-SALAAM: Well, there are
10 actually three exceptions, and the first one is where
11 the contracting party, in failing to exercise
12 reasonable care in the execution of the contract,
13 creates an unreasonable risk of harm to others or
14 exacerbates that risk. And this man was at risk of
15 going to jail.

16 MR. OCHS: The answer to that question - -
17 - that - - - that analysis has been undertaken and
18 rejected by the Southern District in the recent
19 Pasternak case where they said the exceptions to the
20 rule don't apply to remote testing laboratories such
21 as my client.

22 JUDGE PIGOTT: If we assumed they were
23 wrong, how would you justify the point that Judge
24 Abdus-Salaam makes that you are putting people in
25 danger?

1 MR. OCHS: Well, I don't think it's the
2 kind of danger that those - - - that exception
3 applies to. They're talking about - - -

4 CHIEF JUDGE LIPPMAN: It could be a greater
5 danger, counsel.

6 MR. OCHS: Negligence - - - we back up.
7 Negligence is a - - - is a wrong compensable when
8 there is a physical - - - physical harm to either
9 person or property. That doesn't exist in this case.

10 JUDGE GRAFFEO: So all - - -

11 MR. OCHS: There's no - - -

12 JUDGE GRAFFEO: - - - all the states that
13 have found a cause of action in this kind of
14 situation are wrong?

15 MR. OCHS: Well, the leading case that is
16 relied upon is the Berry decision in Kansas, the
17 Kansas Supreme Court decision. And without
18 belittling it, they do things a little differently in
19 Kansas, and we're not in Kansas.

20 CHIEF JUDGE LIPPMAN: Yeah, but that's not
21 - - -

22 JUDGE GRAFFEO: But there's a quite a list
23 of other states - - -

24 MR. OCHS: Correct.

25 JUDGE GRAFFEO: - - - as well.

1 MR. OCHS: All of those cases - - - all of
2 those cases back into a breach of duty by finding
3 foreseeability.

4 CHIEF JUDGE LIPPMAN: Why isn't there
5 foreseeability here?

6 MR. OCHS: Pardon me?

7 CHIEF JUDGE LIPPMAN: Why isn't there
8 foreseeability - - -

9 MR. OCHS: There may be, but that's a
10 separate and distinct element - - -

11 JUDGE READ: But you're saying New York - -
12 -

13 MR. OCHS: - - - of a negligence claim.

14 JUDGE READ: - - - New York law is - - -
15 New York law looks at foreseeability as defining the
16 scope of the duty but not defined a duty.

17 MR. OCHS: Correct, and also - - - it's
18 kind of muddled, but also causation. You know,
19 foreseeability is an item, if you will - - -

20 JUDGE SMITH: As a policy matter, if we
21 recognize the claim that this plaintiff wants us to
22 recognize, what are the disadvantages? Is there a
23 danger of false claims that will be very hard to deal
24 with?

25 MR. OCHS: Well, I think we're going - - -

1 I think we're going to rewrite the - - - the rule
2 book on - - - on negligence, because - - -

3 JUDGE SMITH: Well, I'm less concerned
4 about - - - my question is more practical. Suppose
5 we say that there is a cause of action for people who
6 have false positives, isn't everybody - - - or aren't
7 we going to get an awful lot of people who say I had
8 a false positive, and how do you refute that? Do
9 your clients keep their samples so that they can
10 bring them out and say it wasn't a false positive, it
11 was a real positive?

12 MR. OCHS: I don't know the answer to that
13 question, Your Honor, but what I know is that in this
14 particular case, it worked. The plaintiff had due
15 process rights by statute.

16 JUDGE SMITH: You concede that this was a
17 false positive?

18 MR. OCHS: No, I don't. It was not a false
19 positive. The allegation is not that there was a
20 false positive; the allegation is that the threshold
21 was too low. It met the threshold.

22 JUDGE SMITH: And you - - -

23 MR. OCHS: It was that he should have used
24 - - -

25 JUDGE SMITH: And you - - -

1 MR. OCHS: - - - a higher threshold.

2 JUDGE SMITH: Okay. Do you concede that
3 point? Obviously, you have to, for purposes of the -
4 - - on the face of the pleading we have to take it as
5 true. I guess I'm saying is I'm worried about the
6 fact-finding problems we get into if we recognize
7 this cause of action. Can we reliably, or can courts
8 reliably distinguish the good claims from the bad
9 ones?

10 MR. OCHS: Well, the courts shouldn't have
11 to. There's a due process mechanism set up at the
12 level that plaintiff was involved in, and he went
13 through that process.

14 JUDGE PIGOTT: Well, that's for this, but
15 in a public policy point of view, you're talking
16 about employment, you're talking about eligibility
17 for certain programs. There's a lot of things that
18 this testing can affect.

19 MR. OCHS: Well - - -

20 JUDGE PIGOTT: And I think the question
21 that Judge Smith is asking is, let's assume for a
22 minute that there is such a cause of action, what
23 does that do to your business or to people who do
24 this testing?

25 MR. OCHS: I think it changes it.

1 CHIEF JUDGE LIPPMAN: Does it make you be
2 more careful, counselor?

3 MR. OCHS: I don't think so.

4 CHIEF JUDGE LIPPMAN: Would that be a bad
5 thing?

6 MR. OCHS: I don't think so.

7 JUDGE PIGOTT: Before you go, I did want to
8 - - - you know, you'd mentioned that threshold.
9 Orasure had a 2 - - - no, they had a 3.0; the
10 Department of Health has a 4.0; you use a 1.0. Now,
11 when you did that, I mean, does probation know that?
12 In other words, when you come in and say this is a
13 positive, do they know that you are using a level
14 that is significantly less than both the United
15 States Department of Health and Orasure, who does the
16 swabs that you use?

17 MR. OCHS: At the risk of getting ahead of
18 where we were in this stage of the case, Orange
19 County set that.

20 JUDGE PIGOTT: At 1.0? Okay.

21 CHIEF JUDGE LIPPMAN: Okay, counselor.
22 Thanks.

23 Sir?

24 MR. LANDON: Thank you all for having us
25 today, and I'd like to thank you for some really

1 incisive questioning that cuts right to the heart of
2 the issues here. If you don't mind, I scratched out
3 some notes from what - - -

4 JUDGE PIGOTT: Well, before you get too
5 far, CPL 470.10 gives you a whole due process on
6 anything like this that may occur. And I guess you
7 had the foresight to do your own separate testing,
8 but even assuming that that wasn't the case, don't
9 the courts and the legislature provide for a whole
10 due process system, in the event that every now and
11 then someone's going to get a sample mixed up or lost
12 or something like that?

13 MR. LANDON: Yes, they do, and partially
14 that is in theory. Much of that, if we were to
15 examine the system, is not in practice. Where Mr.
16 Ochs has repeatedly echoed that Landon had his due
17 process rights, what Landon did for three months was
18 attempt to access his due process rights through a
19 series of nonhearing, nothing-on-the-record
20 adjournments. And what Landon ultimately had to do
21 was shout out loud in open court and fire his
22 attorney, demand an evidentiary hearing - - -

23 JUDGE PIGOTT: That was not - - - I mean,
24 if they had their say-so, I assume, they would have
25 said, geez, we hope you'll get it tomorrow; you know,

1 maybe we're wrong, let's get it fixed.

2 MR. LANDON: Precisely. And that - - -

3 JUDGE PIGOTT: That's the court's problem
4 then, it's not theirs.

5 MR. LANDON: Well, it becomes the
6 defendant's problem when the court is asking the
7 defendant, because all of the actions were taken
8 solely on the actions of the defendant, on the
9 information it provided. And Mr. Ochs, where he
10 states that there's no need to create a cause of
11 action because the legislature has already dealt with
12 it; it has created these standards and actually
13 codified them into law - - -

14 JUDGE PIGOTT: Well, two things happened,
15 it seems to me. Somebody must have violated you; I
16 assume that was probation, who started this whole
17 wheel turning. So - - -

18 MR. LANDON: Well, they couldn't before
19 Kroll's action.

20 JUDGE PIGOTT: Of course, but then they're
21 - - - they could have ignored it too, but then - - -
22 I mean, they chose to violate you on this, and that
23 started a process that you say took three months and
24 should have taken a week, or maybe ten - - -

25 MR. LANDON: Precisely, yeah.

1 JUDGE PIGOTT: - - - or maybe ten days.

2 MR. LANDON: Absolutely, I agree.

3 JUDGE PIGOTT: But they're also the ones
4 that did not do a simultaneous urine sample at the
5 time that the Orasure swab was taken initially. And
6 had they, and then this came back, they would have
7 said, well, the urine sample doesn't justify what
8 you're saying, you know, and the fact that - - -

9 MR. LANDON: Well, addressing that
10 specifically, and your previous point, I would state
11 the regulations and the laws of the Department of
12 Health of the State of New York do exist for that, as
13 Mr. Ochs referenced. And he references in his brief
14 - - - in fact, he uses precisely the subsections of
15 Public Health Law that I used to walk into my former
16 attorney's offices to present them with the case.
17 Specifically, Kroll was required by law, mandatory,
18 that they perform a confirmation phase, a dual-phase
19 analysis, because they were doing this work under a
20 New York State Department of Health clinical
21 laboratory evaluation program, comprehensive forensic
22 toxicology permit. That was stipulated to in the
23 request for proposals by Orange County that they put
24 out to bid for Kroll and others to bid the contract.
25 It states clearly that any bidder has to be a holder

1 of this permit in New York State and has to perform
2 the work in compliance with those standards. To win,
3 they have to do the confirmation test, they have to
4 not disclose screened results unless there is an
5 accompanying confirmation result, and Kroll is
6 required to retain the specimen - - -

7 JUDGE PIGOTT: Yeah, but that goes - - -
8 that goes - - - to your main cause of action, when
9 and if you get there. But in terms - - -

10 MR. LANDON: Precisely.

11 JUDGE PIGOTT: - - - in terms of whether
12 there is a duty and what the duty was, my question
13 was directed more at what probation did, could have
14 done, and should have done.

15 MR. LANDON: Oh, I agree. There was duty,
16 plenty to spread around. And the reason that I'm
17 standing here in New York State negligence court is
18 to do with the fact of why former counsel is no
19 longer here with me, and that is a much larger story.
20 I invite you to look into it; Braverman v. Bendiner.

21 CHIEF JUDGE LIPPMAN: Counselor - - - sir,
22 what's your damage? Where were your damages?

23 MR. LANDON: Well, there were a number of
24 issues, beginning with the moment I was violated, I
25 was adjusted from a once-a-month appointment. I was

1 working in both retail and as a funeral director. I
2 now am going once a week. And I had arranged for a
3 whole lot of new life to be timed with the end of my
4 sentence that I had been forecasting for some
5 eighteen months.

6 JUDGE SMITH: So you say you have economic
7 injury, in addition to your attorney's fees - - -

8 MR. LANDON: Absolutely.

9 JUDGE SMITH: - - - and not just a loss of
10 liberty?

11 MR. LANDON: I spent at least 5,000 dollars
12 just going to probation because I had arranged for
13 new employment and new housing in Albany. Likewise,
14 I was engaged to be married. That never came to
15 pass, because for three and a half months I didn't
16 eat, I didn't sleep, I broke a couple of molars
17 grinding my teeth. Do I look like a guy who's got
18 twenty-five pounds to spare? And I basically became
19 unhinged. I - - - each day that I was living under
20 the axe of this pending violation, still undecided, I
21 had to wonder, is today the day that I hang myself -
22 - -

23 CHIEF JUDGE LIPPMAN: So you're - - -

24 MR. LANDON: - - - in a jail cell.

25 CHIEF JUDGE LIPPMAN: - - - you're arguing

1 that you had economic and emotional injuries - - -

2 MR. LANDON: Absolutely.

3 CHIEF JUDGE LIPPMAN: - - - psychological
4 injuries?

5 MR. LANDON: And if I'm going to be honest,
6 I'm going to say the emotional injury far surpasses -
7 - -

8 CHIEF JUDGE LIPPMAN: But the - -

9 MR. LANDON: - - - the economic injury.

10 CHIEF JUDGE LIPPMAN: - - - emotional
11 injury because you were worried about losing your
12 liberty or because of this interference with this
13 life - - -

14 MR. LANDON: My liberty - - -

15 CHIEF JUDGE LIPPMAN: - - - that you had
16 created?

17 MR. LANDON: - - - my family, my employment
18 - - - which I did lose the employment I had at the
19 time and lost the position that had been awaiting me.
20 Everyone in my peer group was awaiting my probation
21 sentence to end. It was actually a career impediment
22 to me, because you couldn't be a full-time funeral
23 director on call if you had to report into probation
24 and had to spend half an afternoon sitting in a
25 waiting room. You just simply couldn't get that kind

1 of time off. And when this violation was filed, I
2 was going once weekly on Mondays, and then
3 additionally, making trips from Albany to Goshen on
4 alternate Wednesdays. So just in my New York Thruway
5 - - - and gasoline, if you guys remember at the time,
6 the crash of 2008, gasoline went over four bucks,
7 close to five. So this couldn't have been more
8 poorly timed. But - - -

9 CHIEF JUDGE LIPPMAN: But you realize even
10 if you win here, that you still have to prove your
11 case - - -

12 MR. LANDON: Oh, absolutely. And there are
13 a few facts that I think - - -

14 CHIEF JUDGE LIPPMAN: - - - and your
15 damages.

16 MR. LANDON: - - - need to be mentioned
17 here because - - - and I've tried to communicate with
18 Mr. Ochs; I don't know if it was inappropriate or
19 not. But when I did discover that former counsel was
20 massaging Landon v. Kroll in a way so as to make it
21 dovetail very nicely with Braverman v. Bendiner, what
22 it did was a severe disservice to Landon because the
23 cases actually could not be more distinguishable.
24 And I would contend that Isseks and Bloom have
25 actually been perpetrating a fraud on each of the

1 courts that they've appeared in both cases, Landon
2 and Braverman, because they've been presenting them
3 as interchangeable twins, sets of facts and
4 circumstances.

5 I just drove from Erie, Pennsylvania, 500
6 miles to Brooklyn, on April 1st, to watch Kevin Bloom
7 argue Braverman v. Bendiner before the Second
8 Department. And it was Landon v. Kroll, Landon v.
9 Kroll, this court found in Landon v. Kroll and
10 Braverman is the same. And it could not be more
11 distinguishable. Those plaintiffs were drug tested
12 under a clinical diagnostic permit, a medical test,
13 not forensic. They were tested in a drug rehab
14 treatment setting by a medical laboratory. Braverman
15 is dealing with Bendiner and Schlesinger.

16 Kroll, on the other hand, is a firm from
17 top to bottom. They are a defense contractor. They
18 do no medical testing. They are staffed. At the
19 time they were CEO'd by former NYPD chief William
20 Bratton.

21 JUDGE PIGOTT: They do a lot of stuff, but
22 - - -

23 MR. LANDON: They sure do.

24 JUDGE PIGOTT: - - - when you get down to
25 this case, like many, many, many, many - - - I don't

1 think there's enough "manys" there - - - violations
2 of probation - - -

3 MR. LANDON: Sure.

4 JUDGE PIGOTT: - - - there are violations,
5 and the protections that are provided are set out in
6 the criminal procedure law that you don't like, that
7 took too - - -

8 MR. LANDON: No, no, no, I like - - - I - -
9 -

10 JUDGE PIGOTT: I'm almost done - - - that
11 took too long. But when it was done, you - - - you
12 were shown not to have violated your probation and
13 you're done.

14 MR. LANDON: Right.

15 JUDGE PIGOTT: Now, one of the - - -

16 MR. LANDON: And after - - -

17 JUDGE PIGOTT: - - - questions we asked Mr.
18 Ochs, and I'd ask you, is what are we opening our
19 courts to if every time somebody says, oh, I got
20 violated on my probation, I'm going to contest that,
21 I'm going to sue the testing company, I'm going to
22 sue the person who did the blood alcohol test, you
23 know, the ampoule makers on my DWI. I'm going to sue
24 the person, because I didn't get a job and I know
25 that it must have been because when they asked me to

1 submit to a test it must be that company that did it.
2 Where do we draw the line?

3 MR. LANDON: Okay. Well, that's actually a
4 very clear line to draw. It's not a case of
5 limitless liability. The sky is not falling. What
6 you have is existing standards where Counselor Ochs
7 has indicated that Landon seeks to expand and broaden
8 the standards and target an industry. There was
9 existing and relevant and enforceable standard,
10 actually much of it that I mentioned; most
11 importantly, their failure to retain it for a period
12 not less than one year, because I, as part of the
13 criminal part of the criminal defense, sought the
14 specimen. And on February 4th of 2008, just six
15 weeks after the specimen had been collected, it was
16 gone.

17 JUDGE PIGOTT: Well, then you win. You
18 can't - - - they can't put the proof in on your - - -
19 on your case - - -

20 MR. LANDON: Precisely. And they dismissed
21 - - -

22 JUDGE PIGOTT: - - - which is good for you.

23 MR. LANDON: Well, they didn't dismiss;
24 they withdrew the petition. But by that - - -

25 JUDGE PIGOTT: But I would think, then,

1 that the probation department - - - I don't know if
2 they go with the lowest responsible bidder, but
3 whenever they do their RFP for whoever's doing this,
4 would have a conversation with whoever they were
5 providing this to and get it taken care of. If they
6 have - - - if probation has a company that's not
7 doing the job, isn't that probation's problem?

8 MR. LANDON: Oh, I'd say it's both of their
9 problems.

10 JUDGE PIGOTT: Right.

11 MR. LANDON: So you have - - - basically
12 what you have is a conspiracy. If you have two
13 individuals on a street corner, and one of them is
14 making a purchase of narcotics and the other is
15 selling, they're both involved in a knowingly,
16 willful, unlawful act. And that is precisely what
17 Kroll did here. Kroll had to elect, over a
18 protracted period of time, presumably several
19 different individual employees to first fail to do
20 the confirmation - - -

21 JUDGE PIGOTT: Well, you're asserting - - -
22 wait a minute, wait a minute - - - you're asserting
23 that this is intentional or something. I mean, if -
24 - -

25 MR. LANDON: Oh, I think it is - - -

1 JUDGE PIGOTT: Well - - -

2 MR. LANDON: - - - and I think I can prove
3 it is.

4 JUDGE PIGOTT: - - - all right, so if
5 you're that important, then you're the only one in
6 Orange County that they decided they were going to do
7 this to, and all of the others in Orange County who,
8 for some reason, either don't contest or - - -

9 MR. LANDON: No - - -

10 JUDGE PIGOTT: I'm almost done - - - or the
11 - - - or the test proved to be accurate, it's over.

12 MR. LANDON: No, I can answer that very
13 simply. I'm not the only one who was dealt a bad
14 test; I'm the only one who prophylactically arranged
15 for forensic blood testing, and I had my specimen
16 drawn thirty-three minutes after.

17 JUDGE SMITH: Out of curiosity, what
18 prompted you to do that?

19 MR. LANDON: A prior false positive test
20 where I jumped up and down for forty-nine weeks
21 protesting my innocence. All told, through what was
22 supposed to be a five-year probation sentence, I
23 ended up with six-and-a-half years for two
24 violations, both of them arising out of the Orasure
25 intercept. The first time I swore my innocence, I

1 refused to plea, I offered up all kinds of academic
2 and industry papers to the court on how the Orasure
3 is actually not reliable, especially if it's only a
4 screen phase. I couldn't get anywhere. I was using
5 Legal Aid. But I learned my lesson; I contacted a
6 physician friend, I explained to him the
7 circumstances I was in, and that I now I had a four-
8 year future relationship; how do I protect myself.
9 He wrote me a standing on-demand blood order that I
10 could go to any LabCorp blood outlet. There was one
11 on Crystal Run Road in Middletown, just down the
12 street from probation. Any time they tested me I
13 said, great, have a nice day, see you next month - -
14 -

15 CHIEF JUDGE LIPPMAN: Okay.

16 MR. LANDON: - - - I got there quick.

17 CHIEF JUDGE LIPPMAN: Okay, sir. Thank you
18 for coming in.

19 MR. LANDON: Precisely.

20 CHIEF JUDGE LIPPMAN: Appreciate it.

21 MR. LANDON: So just to restate, I'm not
22 the only one; I'm just the only one who could defend
23 it.

24 JUDGE PIGOTT: Did you sue Orasure as well?

25 MR. LANDON: No, not at all. No.

1 Orasure's information was good, and where you guys
2 did address the cutoff level, both Orasure, the FDA,
3 and the New York State Department of Health,
4 stipulate to at least a three nanogram/milliliter
5 cutoff, and probation was indeed using a one
6 nanogram. Anybody who knows anything about any type
7 of scientific testing, the lower your threshold for
8 screen detection, the higher your false positivity
9 rate. So they, as laboratory professionals, are
10 going to know if we're practicing this lower
11 threshold, we better be on the lookout - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. LANDON: - - - for false positives.

14 CHIEF JUDGE LIPPMAN: Thank you.

15 MR. LANDON: So we'd better confirm - - -

16 CHIEF JUDGE LIPPMAN: Appreciate - - -

17 MR. LANDON: - - - and they didn't.

18 CHIEF JUDGE LIPPMAN: Appreciate it.

19 MR. LANDON: Thank you.

20 CHIEF JUDGE LIPPMAN: Thank you.

21 Rebuttal, counsel?

22 MR. OCHS: Just very briefly. I neglected
23 to bring to the court's attention a case in the
24 Eighth Circuit; it's called Miller v. Redwood,
25 decided after the briefing. And it is the only other

1 case in the land, as far as we can tell, and we've
2 looked diligently, involving - - - let me give you
3 the cite: 688 F.3d 928 (8th Cir. 2012). It's the
4 only case in the land where a probationer brought a
5 suit against a remote testing lab, claiming that the
6 test results applied or misapplied a standard, and
7 sought - - - and brought a claim for negligence. And
8 the Eighth Circuit determined, in that case, that
9 there was no duty owed between test subject and
10 remote testing lab.

11 JUDGE PIGOTT: You note, and I - - - one of
12 the two of you noted that there was no simultaneous
13 urine sample taken. Was that - - - was that, in your
14 view - - - was probation supposed to do that?

15 MR. OCHS: We tested what we were given,
16 both the amount and what was tested. We had nothing,
17 whatever, to do with the testing itself - - - I mean,
18 with the - - -

19 JUDGE ABDUS-SALAAM: What about the
20 confirmatory test, the - - - what about the - - - was
21 it glass or gas chromatography confirmatory test?
22 Was that something you were supposed to do?

23 MR. OCHS: We did not have a sufficient
24 sample to do any other - - - other confirmatory
25 testing.

1 I might add also, and again, it's maybe a
2 little beyond the record, but the standards that are
3 referred to in the complaint are employment workplace
4 standards; they're not criminal justice standards,
5 and they are proposed and not adopted standards.

6 CHIEF JUDGE LIPPMAN: Okay, thanks.

7 MR. OCHS: Thank you very much - - -

8 CHIEF JUDGE LIPPMAN: Thank you both.

9 MR. OCHS: - - - for your time.

10 CHIEF JUDGE LIPPMAN: Appreciate it.

11 MR. LANDON: Could I possibly for a moment
12 rebut?

13 CHIEF JUDGE LIPPMAN: We can't.

14 MR. LANDON: There - - - okay.

15 CHIEF JUDGE LIPPMAN: We can't. But
16 appreciate both of you coming in.

17 MR. LANDON: Fair enough.

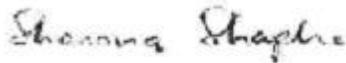
18 CHIEF JUDGE LIPPMAN: Thank you.

19 (Court is adjourned)
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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Eric Landon v. Kroll Laboratory Specialists, Inc., No. 142 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: September 8, 2013