

Admissibility of the Failure to Submit to Required Drug and Alcohol Testing Under 382.303

1. Two audiences.
 - a. Judge.
 - i. This audience has to say “okay” before the second one gets to hear it.
 - ii. Because this is so inflammatory many judges are reluctant to allow this failure, without more, to be heard by the jury. Below are concepts to explore which may, in some cases, provide that additional information which some judges will require.
2. State of Mind - Intentional.
 - a. Driver and/or company knew they had a duty to get tested for drugs and alcohol.
 - i. Lay the foundation.
 - (1) The driver/company had basic knowledge of the law.
 - (a) You are a careful driver?
 - (b) You know people’s lives are at risk when driving a large vehicle on the highway?
 - (c) You know there are federal laws/regulations that apply to driving large truck over the highways?
 - (d) You studied those laws, the federal laws for safe and responsible operation of semi-trucks on the highway . . .
 - (2) Driver had knowledge of the facts (elements factually met).
 - (a) **Citation given.**
 - (i) How did they plead (get a copy)?
 - (ii) Had you ever received a ticket or citation before this wreck?
 - (iii) You were given a ticket in this wreck, right?
 - (iv) Obviously, if I use them term ticket or citation you will know I am talking about the same thing, okay?
 - (v) How long was it after the wreck was it that you became aware you were going to get a ticket?

- (vi) What did the officer say to you when you were given the citation for the moving violation (“moving” is critical)?
- (vii) ... develop it some more...
- (b) **Bodily injury with immediate medical treatment away from the scene.**
 - (i) You were paying attention, after the wreck, to what was going on, true?
 - (ii) The highway patrol report states that an ambulance arrived at some point, did you see that in the report?
 - (iii) All the witnesses saw the ambulance at the scene, did you talk with any of them about the ambulance?
 - (iv) Most of the people testified the ambulance got there about 15 minutes after the wreck, when do you think it arrived?
 - (v) Where were you standing when you first saw the ambulance coming on to the scene?
 - (vi) Similar in-depth development of “seeing” someone get in the ambulance and being taken away. If the driver may not have seen the injured party get into the ambulance or be taken away, then you may take a different approach, such as: The patrolman and all the other witnesses testified that “Jane Doe”, the passenger, was taken away by ambulance, you knew that as well, right?
 - (vii) And at the scene of the wreck, you were concerned for Jane, I mean you are human and you were hoping everything would go okay at the ER, true?
 - (viii) Knowing that she was taken away from the scene of the wreck by ambulance, did you follow up after the wreck on her condition?
 - (ix) Did you talk to anyone after leaving the wreck scene about her being taken away by ambulance, talk with anyone at

any point in time after the wreck about that? (This establishes that everything the driver knows about the ambulance and leaving for treatment came from the time of the wreck - i.e. the driver knew this element was met when the driver made the decision not to get tested. They didn't "just find about it" a week later.)

- (c) **Fatality.**
 - (i) Similar type questions and development of evidence.
- (3) Specific knowledge of the law (legal elements).
 - (a) Now, you know, and of course you knew then, that if you received a citation for a moving violation and someone was taken away from the scene because of bodily injury for treatment, you had to undergo drug and alcohol testing, true?
 - (b) You also knew that if you received a moving violation citation, and there was disabling damage to any vehicle that required it to be towed away, you had to undergo drug and alcohol testing, true?
 - (c) Knowing this, you still did not get drug or alcohol testing, is that accurate?
- (4) Why no testing?
 - (a) Why didn't you get testing?
 - (b) Any reasons not to get tested? (Find out the excuses, now, so you can deal with them. If they take you off guard and knock you for a loop, wait a few minutes then take a break. Go sit in you car and close you eyes and think about it for a few minutes. Its surprising what a clear mind will realize.)
 - (c) Who did you talk to about testing?
 - (i) person.
 - (ii) times.
 - (iii) dates.
 - (iv) all conversations, everything said.
 - (v) you may get people pointing fingers at each other - **creating more evidentiary fact questions.**

(5) Was it willful, or tantamount to willful? - You have just established that!

3. Physical appearance and behavior.
 - a. Driver testimony as to appearance and behavior, compared to plaintiffs and witnesses.
 - i. Look at the “Drug Symptomatology” table on the website.
 - ii. **Discrepancy of behavior and symptoms among witnesses - Creates an evidentiary fact question** (this is important to judges, if they are going to give the issue to the jury).
 - b. Drug and Alcohol recognition expert - a consideration in some cases, but not needed in some jurisdictions.
4. Physical finding (not actual drug and alcohol testing).
 - a. Did the driver go to the ER?
 - b. Blood Pressure, Pulse, Respiration - certain drugs, as have characteristic effects.
5. Sanctions.
 - a. Disallowing evidence.
 - b. Dismissal of all or part of a pleading, strike a pleading - comparative fault, all defenses to liability.
 - i. May help on a close liability case.
 - c. Monetary penalty, such as attorney fees.
 - d. Adverse instruction:
 - i. 3 Federal Jury Practice Instructions, Section 72.16 - If a party fails to produce evidence that is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not; See *Lewy v. Remington Arms*; 836 F2d 1104, 1112 (8th Circuit 1987)
6. Negative inference vs. a separate cause of action.
 - a. If a negative inference is requested the defense will admit liability, on clearer liability cases, to eliminate discussion of the topic.
 - b. If you claim “driving impaired” then the defense will claim you are basing your entire case on this issue and it is equivalent, or tantamount, to a separate cause of action, which the majority of states do not allow.

7. Punitive Damages.
 - a. **Often the most justified reason for allowing the issue before the jury.**
 - b. Punitive damages allows the negative inference but does not truly create a separate cause of action.
 - i. If you claim punitive damages you may likely be able to keep the failure admissible under the concept that this evidence is not the basis of a true separate cause of action, but merely an extension of the damages argument for the underlying claim. Again, the defense will argue this is the only basis for the punitive damages claim, and therefore creating a separate action for the failure. But this argument is not true. Truth is on your side, not the defense.