
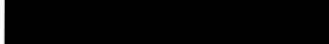




MEMORANDUM

To: 

From: 

Date: June 23, 2008

Subject: Adverse Inference from Failure to Perform Drug and Alcohol Tests
(BRA098/124388)

It is likely that Dr. Bradshaw will be able to argue an adverse inference from the failure of the Defendant to test its driver for controlled substances and alcohol post-accident. As a general rule, a party is allowed to argue an adverse inference when the opposing party fails to "produce or suppresses evidence which is particularly within his knowledge or under his control and which he would naturally be expected to introduce if favorable to him." *Graeff v. Baptist Temple of Springfield*, 576 S.W.2d 291, 306 (Mo. 1978). While there is no case law directly on point, adverse inferences have been allowed in civil cases where it is relevant to refute a claim concerning the sobriety of the defendant. *Wilson v. Shanks*, 785 S.W.2d 282, 285-286 (Mo. banc 1990).

There is a line of contrary case law in the criminal context Dr. Bradshaw will need to distinguish. It is a well-settled principle of Missouri criminal law that a party cannot raise the failure of the prosecution to collect various types of scientific evidence or to perform tests, including for controlled substances. See e.g. *State v. Schneider*, 736 S.W.2d 292, 401-402 (Mo. banc 1987); *State v. Hopson*, 168 S.W.3rd 557, 564 (Mo.App. E.D., 2005); *State v. Goforth*, 736 S.W.2d 552; *State v. Hope*, 954 S.W.2d 537, 545-546 (Mo.App. E.D. 1987). The logic underlying these cases is that the state is not required to perform the tests or to collect particular types of evidence. *Hope*, 954 S.W.2d at 545-546. In this case, that logic does not apply. A trucking company is required, pursuant to federal regulations, to take controlled substance and alcohol tests post-accident of its driver if either a death results or the driver receives "a citation within eight hours of the occurrence . . . for a moving traffic violation arising from the accident" and the accident involves either bodily injury to a person who is treated away from the scene of the accident within a set time period or the accident does "disabling damage" to a vehicle such that it has to be towed away. 49 C.F.R. § 382.303(a)(1-2). Here, our client was both injured and the vehicle needed to be towed post accident.

