

PENNY PLAINTIFF and PAUL PLAINTIFF	§	IN THE DISTRICT COURT
	§	
	§	
V.	§	GRAYSON COUNTY, TEXAS
	§	
XYZ COMPANY and ABC COMPANY	§	336TH JUDICIAL DISTRICT

**DEFENDANTS' TRIAL BRIEF IN SUPPORT OF MOTION
TO EXCLUDE ANY EXPERT TESTIMONY OR EVIDENCE
PERTAINING TO DRUG TESTING OF ERWIN EMPLOYEE**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants XYZ Company and ABC Company file this Trial Brief and would show as follows:

I.

INTRODUCTION

Plaintiffs will attempt to introduce evidence regarding drug tests performed on Erwin Employee *subsequent* the motor vehicle accident. Defendants would show that the drug testing is irrelevant and inadmissible for all purposes. Defendants would show the Court:

- ▶ no evidence of cocaine use at the time of the accident;
- ▶ no evidence of diminished capacity due to cocaine use at the time of the accident;
- ▶ post-accident drug tests lack trustworthiness under Rules 702, 803(6) and 902(10)
- ▶ post-accident drug tests are irrelevant and immaterial;
- ▶ post-accident drug tests are highly prejudicial; and outweighs any substantial value; and
- ▶ the prejudice substantially outweighs any probative value.

Accordingly, no allegations or testimony regarding post-accident drug testing should be permitted into evidence.

II.

BACKGROUND INFORMATION

This lawsuit involves an automobile/truck accident on November 4, 1993. Erwin Employee did NOT receive a citation for the accident until four days later days later on November 8, 1993.

Five days after the accident and one day after receiving the citation, Erwin Employee--on November 9, 1993--provided a urine sample for purposes of controlled substances testing. Bill Weldon, the medical review officer, cancelled this test as nonconforming.

On Monday, November 22, 1993, eighteen (18) days after the accident, Defendant's driver, Erwin Employee, failed a post-accident drug test, attached herein as Exhibit "C", and was terminated. This test occurred on a Monday morning, more than two weeks after the accident made the basis of this lawsuit.

III.

POST-ACCIDENT TESTING IS NOT RELEVANT

Plaintiffs are attempting to introduce evidence to prove a proposition that is not at issue in the present case: Erwin Employee's use of cocaine *after* the accident. Cocaine use after the accident is immaterial.

A. Applicable Law

1. Relevance Defined

Rule 401 defines relevant evidence as having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Relevancy also includes the test of materiality. The evidence must tend to prove a proposition that is material to the case.

2. Intoxicants and Proximate Cause

The use of an intoxicant, standing alone, does not prove negligence. There must be evidence of a negligent act or omissions connected with the use of the intoxicant. *Benoit v. Wilson*, 239 S.W.2d 792, 798 (Tex. 1951). "Evidence of intoxication, standing alone, does not establish negligence or proximate cause." *Benoit v. Smith*, 239 S.W.2d 792, 798 (Tex. 1951). Intoxication or use of intoxicants is NOT an ultimate issue in itself. *Id.* Rather, there must be some other act of negligence, **in combination with the intoxication**, that caused the party to be "at fault."

C. Application of Law to Facts

The use of the intoxicant is admissible only if its use is connected with the alleged negligent conduct. Here, no issue of mental or physical impairment exists. Mr. Erwin Employee was cautiously backing out of the Exxon Station with the **aid of three spotters**. Mr. Employee's actions were not the result of someone who has lost the use of his physical or mental capacity. It was a determined choice given the obstructions surrounding the station.

There is no evidence that Mr. Employee was under the influence of cocaine at the time of the incident. To the contrary, at the scene of the accident, Mr. Employee appeared and acted normal and was not administered field sobriety test, drug analysis and citation was not issued for driving under the influence of cocaine.

Plaintiffs' own expert testified to determine if Erwin Employee was under the influence of cocaine at the time of the accident. Tr. p. 20, ln 7-10. And, Floyd E. McDonald testified as follows:

Q And have you concluded he was or wasn't under the influence of cocaine, or that you can't determine?

A Well, basically, that you can't determine. That he could have been but you can't say for sure.

Q When you say "he could have been," it's just as likely that he could not have been; is that fair.?

A Sure.

See Deposition Transcript, pg. 20, ln

Every expert in this case, including Plaintiffs' toxicologist, agrees that a November 9th and November 22nd drug test are NOT indicative of anything with respect to activity on November 5th. Hence, the post-accident drug tests are irrelevant with respect to any alleged negligence on the part of Erwin Employee.

In other words, neither the November 9th urinalysis nor the November 22 test have a tendency to make it more probable that Erwin Employee was under the influence of cocaine on November 4, 1993.

IV.

POST-ACCIDENT TESTING IS NOT SCIENTIFICALLY RELIABLE TO PREDICT COCAINE USE ON NOVEMBER 4, 1993

Not only does the post-accident drug testing fail the first prong of a *Robinson* challenge, relevance, it also does not meet the second prong--reliability. Science does not recognize drug testing for cocaine or cocaine metabolites more than three days after cocaine's initial ingestion. Any testimony or evidence to the contrary does not meet the strict *Robinson* standards.

A. Applicable Law

In *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), the Texas Supreme Court designated the trial judge as the "gatekeeper" responsible for determining which expert testimony is admissible. The Court in *Robinson* went on to set out the following minimum criteria for the trial judge to consider in making a threshold determination of admissibility of expert testimony:

- (1) The extent to which the expert's theory has been or can be tested;
- (2) The extent to which his technique relies upon his subjective interpretation;
- (3) Whether his theory has been subjected to peer review and/or publication;
- (4) The technique's potential rate of error;
- (5) Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community;
- (6) Nonjudicial uses that have been made of the theory or technique.

Under the foregoing criteria, the issue is whether the November 9, 1993 urinalysis can

demonstrate reasonable probability that Erwin Employee was under the influence cocaine on the night of November 4, 1993. The answer is no.

B. Application of Law to Facts

The sole evidence of any cocaine use is a drug test which was administered eighteen (18) days after the accident. This test does not, and can not, show that the cocaine registered in this test was taken by Mr. Employee in any proximity to this accident.

In this case, Dr. Bill Weldon has testified cocaine metabolites stay in the system no more than two days. Dr. K.L. Ford, a board-certified pathologist, has testified that cocaine only stays in the system for hours while the cocaine metabolite stays in the system for only two to three days. According to Dr. Eric G. Comstock, a physician specializing in medical pathology, it is generally recognized in the medical community that cocaine metabolites do not remain in the system more than three days after ingestion. In fact, Dr. Comstock testified the maximum is three days.

Again, Dr. MacDonald and Dr. Comstock agree a November 9, 1993 or November 22, 1993 urine screen positive for benzoylecgonine means absolutely nothing with respect to a November 4, 1993 accident. Both screens are too remote in time and tests a substance that is irrelevant with regard to one's behavior.

Hence, the post-accident drug tests do not meet the *Robinson* standards to predict drug use by Erwin Employee on November 4, 1993. First, the Dr. MacDonald's theory of cocaine staying in the system for 7 to 14 days with chronic use has no basis in fact. Plaintiffs have no evidence Erwin Employee is a chronic user. Erwin Employee retired after twenty years from

TU Electric, which performed drug testing on its employees. Mr. Employee's employment records, on file with this Court, demonstrate that he never tested positive for controlled substances during this employment. Clearly, Dr. MacDonald is attempting to apply one inference upon another--without a factual basis to do so.

Moreover, a positive screen is NOT reliable without a second test, called Gas Chromatography Mass Spectroscopy (GCMS), which is required by the DOT regulations. This second test was not performed on either November 9th or November 22nd. Based on accepted medical evidence and the prevailing literature, this type of preliminary drug screen does not hold up under scrutiny.

Finally, Plaintiffs have not met a single *Robinson* requirement. Plaintiffs have not shown that Dr. MacDonald's 7 to 14 days theory of cocaine metabolites has been and shown applicable to Erwin Employee. Plaintiffs cannot escape that the theory relies on assumptions about chronic use. Plaintiffs have not shown that MacDonald's theory has passed peer review. Plaintiffs have not shown that Dr. MacDonald's conclusions regarding Erwin Employee are not subject to a high rate of error. Plaintiffs have not that this 7 to 14 days cocaine metabolites theory has been generally accepted as valid by the relevant scientific community. Finally, Plaintiffs have not established that nonjudicial uses would be made of this theory.

V.

POST-ACCIDENT TESTING IS HIGHLY PREJUDICIAL

A. Applicable Law

Although relevant, evidence should be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury.

Rule 403 requires a balancing test. The impact of a drug testing on a Grayson County jury would be immense. It is likely a jury from this venue would be unable to

B. No Probative Value

Again, the use of cocaine is NOT a central issue in this case. The only liability issue with respect Defendant XYZ Company and Erwin Employee is whether backing across Highway 69 was a proximate cause of the accident. Cocaine use plays no determination in this analysis. The decision to back across Highway 69 was NOT the result of cocaine use. Rather, it was caused by the positioning of the tanker, the presence of other cars, and the layout of the Exxon station. The jury must consider all of these factors--but NOT the use of cocaine--to determine if Erwin Employee negligently operated his vehicle.

At best, the presence of cocaine in Mr. Employee's system is on the very outer edge of relevance. Mr. Employee's alleged cocaine use *after* the accident is in the nature of an extraneous event which is too far remote to play any bearing on the night of November 4, 1993.

C. Nature of Prejudice

Without a doubt, this case will be lost, and unfairly so, if the post-accident drug testing evidence is admitted. The jury will focus on no other factor than the alleged use of cocaine by Erwin Employee. This type of evidence will deflect the jury from deciding the case on the legitimate issues and cause the jury to decide the case on an improper basis--an emotional outrage.

The jury will be improperly influenced and less likely to consider the facts surrounding

the night of November 4, 1993. It is inescapable a jury will be unduly persuaded by this type of evidence. Drinking and driving has been a hot button issue in today's society. The use of illicit drugs is even a bigger issue. Plaintiffs are attempting to use the impact and stark reality of a cocaine-using trucker to scare the citizens of Grayson county into a large judgment against XYZ Company.

Plaintiffs' sole basis for this allegation is to prejudice the jury against Erwin Employee. Plaintiffs can present zero proof from the night of November 4, 1993 concerning the behavior or actions of Erwin Employee. There is absolutely no evidence that Employee's alleged use of cocaine was a "cause in fact" of the collision. No evidence from anyone that Erwin Employee did not handle himself 'normally' or that the decision to back out of the Exxon was caused by cocaine use. Plaintiffs have no more than a scintilla of proof to establish proximate cause in Mr. Employee's alleged cocaine intoxication and the accident. Mr. Employee's driving was NOT erratic or irregular. He purposefully and intentionally attempting to back up his tractor-trailer with the aid of three spotters.

D. Conclusion

Because our society is very intolerant of drug use, introduction of a statement of this magnitude, absent any proof of proximate cause and without further proof that Mr. Employee was actually under the influence at the time of the incident, will be highly prejudicial and could cause irreparable harm to the Defendant.

The very introduction of this evidence in and of itself could cause judgment to be rendered against this Defendant. Justice would not be served.

VI.

CONCLUSION

No testimony or evidence of the post-accident urinalysis should be admitted into evidence. The post-accident drug tests are irrelevant and do not constitute any probative value whatsoever. Further, prejudicial impact of a positive urinalysis undoubtedly outweighs the minor, if any, probative value of the testing. Accordingly, the November 9, 1993 and November 22, 1993 urinalysis of Erwin Employee should not be permitted into evidence. Further, any testimony from Floyd MacDonald does not rest on a reliable foundation and should be stricken.

WHEREFORE, PREMISES CONSIDERED, Defendants XYZ Company and ABC Company pray that this Motion be set by the Court for hearing, and that on such hearing, said Court exclude any and all opinions of Officer Pierce as it pertains to the specific cause(s) of the motor vehicle accident in question.

Respectfully submitted,

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