



Punitive Damages Permitted Based Upon Failure To Maintain Documents Required By FMCSR

Stephen M. Gorny
The Gorny Law Firm, LC, Trial Attorneys
4330 Belleview Avenue, Suite 200
Kansas City, MO 64111
(816) 756-5071 | steve@gornylawfirm.com

INTRODUCTION

In 2017, after a multi-year battle, we were able to obtain a Court Order allowing us to amend our Petition for Damages to include a count asserting punitive damages against Defendant CAT Transports. Armed with little precedent addressing this issue, it took us more than one year to educate our Judge in Topeka, Kansas about how the failure to maintain safety-related materials equated to an actual conscious disregard for the safety of the motoring public. We tied the lack of compliance materials to the facts of the crash to link the defendant's failures to causation. Through this article, it is my aim to explain how we procured the important Order in hopes that others may obtain similar rulings to hold companies accountable when they fail to produce documents verifying that they completed critical safety procedures. The Editor intends to make documents available on the TLG website. You may also contact the author.



FACTS OF THE COLLISION

The Plaintiff in the action was Kansas State Trooper Gregory Kyser. Trooper Kyser's grandfather was an officer. From the time he was a little boy, he was in awe of the uniform and maintained a strong ambition to serve his community.

He rose through the ranks in local law enforcement to obtain a post with the Kansas Highway Patrol. While patrolling on westbound U24 in Shawnee County, Kansas at 7:46 a.m. on January 23, 2014, he was stationed in a construction zone to regulate traffic flow in a safe and lawful manner.

After passing eight different signs warning of a construction zone ahead, Billy

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Basye, operating a tractor trailer for Defendant CAT Transport, approached the construction zone. In that area, the lanes shifted to the left to allow for construction of a new section of roadway. Rather than follow the designated lanes of travel, trucker Bayse proceeded straight. He rammed through wooden barricades blocking off



the old highway. He then slammed into the back of and over the left rear corner of Trooper Kyser's cruiser.

Trooper Kyser was thrown violently around inside his vehicle. The dash camera captured the shattering of windows and glass flying throughout the car. He suffered a shoulder injury and PTSD. Trooper Kyser experienced less than \$10,000 in

medical expenses. Nevertheless, because of his PTSD, he was forced to leave his position on the roadway and accepted a desk job for the remainder of his career.

A witness traveling behind trucker Bayse verified that he never applied his brakes until after crashing into the wooden barricades. She confirmed that he simply drove straight rather than following the lane shift for the construction zone.

As you might imagine when one of their own gets injured, we had the benefit of an extremely thorough accident reconstruction by the Highway Patrol. We had aerial photos and countless other video and photographs from the scene. They performed a level 1 inspection which revealed several problems with the truck and some entries of "concern" in the driver's log. Also, importantly, troopers responding to the scene of the collision engaged their dash cameras in route. This enabled us to easily identify all of the warning signs about the construction zone within which the collision took place.

JURISDICTION AND VENUE

For informational purposes, it is important to realize that Kansas in general is a very conservative state. Shawnee County is the site of the State Capital of Topeka. Look at how bright red Kansas is on any political map and you will understand the makeup of the jury pool.

Nevertheless, I have never been fearful of a case against a commercial carrier and driver in a conservative venue. Regardless of political persuasion or affiliation, I believe that most jury members are interested in highway safety and ensuring that those companies transporting goods in 80,000 pound vehicles are doing so properly.

The Shawnee County District Court and its bench, nevertheless, are also typically conservative. Judicial appointments have historically been made by Republican governors resulting in a significantly conservative bench. We drew the Honorable Franklin Theis in this case. We were nothing but impressed with Judge Theis' willingness to listen to all arguments and to review all pleadings before

making decisions. While this led to multiple hearings before gaining substantial rulings, we were confident that any such rulings ultimately would hold up on appeal.

INITIAL DISCOVERY

As we do in most trucking cases, we sent initial Requests for Production of Documents and Interrogatories. The Requests for Production largely tracked the information specified in our evidence preservation letter that goes to the defense as soon as we get the case in the office.

The defendants produced five pages of materials in response to the requests for production. Yes, just five pages.

We began what is known in Kansas as the "Golden Rule" process. I placed defense counsel on notice of the discovery deficiencies. In doing so, I set forth the applicable Federal Motor Carrier Safety Regulations and document retention requirements therein. Defense counsel responded by indicating that he simply could not produce what his client did not give him.

We then engaged the Court by filing a Motion to Compel production. The Court was reluctant to bring down the hammer and provided the defendant with additional time to produce the requested information. The Judge put no teeth in the initial ruling despite expressing some understanding of the Federal Motor Carrier Safety Regulations and what would be required of the trucking company.

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CASE NUMBER: 2014-CV-000738

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

GREGORY KYSER,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 2014-CV-000738
)	
CAT TRANSPORT, and)	
BILLY BASYE,)	
)	
? Defendants.)	

MOTION TO COMPEL DISCOVERY RESPONSES AND DATES FOR DEPOSITION

Plaintiff, through counsel, hereby requests the Court's Order compelling Defendants CAT Transport and Billy Basye to produce discovery responses and provide dates upon which requested depositions can take place. In support of this motion, Plaintiff states as follows:

1. With the Petition, Plaintiff served written discovery questions upon Defendants.
2. Counsel for Defendants requested an extension of time to provide written discovery responses. Plaintiff's counsel consented to that extension of time. To date, said discovery responses are overdue.

The time specified for the supplemental production came and went. As a result, we filed a second Motion to Compel and included a request for sanctions. Again, the Judge did not punish the defense. Instead, he advised me to convert the Requests for Production to Interrogatories so the defense would have to answer under oath. Of course, I followed his direction.

ORDER COMPELLING PRODUCTION

The defense then failed to respond to the Interrogatories asking what safety-related information existed at the company. Having now provided the defense with additional time to respond to discovery and seeing that nothing was produced even after he dictated the format of that discovery, the Court issued an Order compelling discovery by a date certain. Still lacking significant teeth, the Order did not specify a penalty other than the defendant would be required to send witnesses from Texas to Kansas for their depositions as a penalty for failure to produce the requested documents in a timely manner.

At 4:55 p.m. on the last day specified for production, defense counsel delivered a banker's box of documents. In opening the box, I anticipated that we would finally get the discovery to which we were entitled and the opportuni-

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"[Roger Allen] opined that the absence of that documentation, in the eyes of the trucking industry, equates to a failure to perform the safety measures the regulations are intended to compel."

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ty to determine policies and procedures of the trucking company and whether they satisfied federal regulations with regards to the driver at issue. Therefore, I was somewhat surprised upon opening the box and learning that there were still only five pages of materials generated by the trucking company. Included in the production were copies of the Federal Motor Carrier Safety Regulation handbook, copies of J.J. Keller publications, and copies of other industry materials. Other than those five pages, the company produced nothing that it actually generated.

Notably absent was anything regarding the driver qualification file. Interestingly they had a driver qualification file checklist much like many trucking companies do. However, nothing was checked for the driver at issue and there were no corresponding materials produced. The materials were void of any documents required by the federal regulations. No logs. No drug tests. No medical certificate. No driver history. No employment application. I had never seen such a lack of documentation.

We then had to decide what to do with the lack of information produced. Certainly, we figured we would be able to hammer the Safety Director and driver in deposition with their overt failure to maintain required documentation. However, we decided to try to do something more with the ridiculously lax document retention by the trucking company. First, we moved the Court to strike the Defendant's Answer. That motion was denied, but he did order defense witnesses to travel to Kansas for depositions. We decided to take the lack of production a step further.

PUNITIVE DAMAGES IN KANSAS

Pursuant to Kansas law, we cannot initially plead punitive damages when filing a lawsuit. Instead, for good cause shown by clear and convincing evidence, we have to demonstrate to the Court the probability that we will be able to make a punitive submission at trial. Only then can we amend the original filing to include a punitive claim.

We believed that the only way to get the trucking company to take the matter seriously and to get their insurance company engaged was to file a Motion for Leave to Amend our Petition and add a claim for punitive damages. Our initial Motion was admittedly rushed to the courthouse in frustration over the lack of production. Defendants opposed the Motion by arguing that we lacked a sufficient causal connection between the lack of document production and the crash. Therefore, we engaged the services of Roger Allen. Mr. Allen drafted a lengthy affidavit detailing the reasons why document retention is required under the federal regulations. He also opined that the absence of that documentation, in the eyes of the trucking industry, equates

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

GREGORY KYSER,

Plaintiff,

vs.

CAT TRANSPORT,
BILLY BASYE,
and
CHRISTOPHER JONES

Defendants.

Case No. 2014-CV-000738

MOTION FOR LEAVE TO AMEND PETITION

Plaintiff Gregory Kyser, through the undersigned counsel, hereby respectfully requests Leave of Court to amend his Petition. In support of this Motion, Plaintiff states as follows:

1. This matter is currently set for a pre-trial conference on December 18, 2015.
2. This matter will proceed to a trial on damages only as Defendants failed to timely produce all requested documents in accordance with the Court's October 1, 2015, Order.
3. In the limited materials provided by Defendants, there are essentially five pages of original documents granted by the Defendants.
4. One of the five pages of original material indicates that Mr. Basye had at least one

to a failure to perform the safety measures the regulations are intended to compel. A copy of that affidavit was attached to our supplemental Motion for Leave.

After filing our Motion and Affidavit, defense counsel convinced the Court to allow him to take Mr. Allen's deposition before ruling on our Motion for Leave to Amend. Therefore, we traveled to Texas for Mr. Allen's deposition. He was solid on every point in his affidavit. The deposition actually gave him an opportunity to expound on the opinions he expressed and the manner in which the lack of documentation demonstrated a conscious and reckless disregard for the safety of the motoring public.

The defense did not stop there. Counsel went back to the Court and convinced Judge Thies to provide the defense the opportunity to identify an expert of their own. The judge agreed to give them time to designate a witness.

Thus, the defense designated Andy Sievers, no stranger to the world of trucking litigation. He generated a report and I took his deposition. Mr. Sievers turned out to be as strong of a witness for us as Roger Allen. I walked him through a number of the Federal Regulations that CAT Transport was obligated to follow. Upon agreeing with the lack of evidence of compliance in connection with the vehicle deficiencies noted by the Highway Patrol, he conceded that the truck should have been out of service on the day of the crash. Similarly, due to the complete lack of documentation pertaining to the truck driver, Mr. Sievers admitted that there was a lack of evidence that the driver was qualified on the day of the crash.

MOTION FOR LEAVE GRANTED

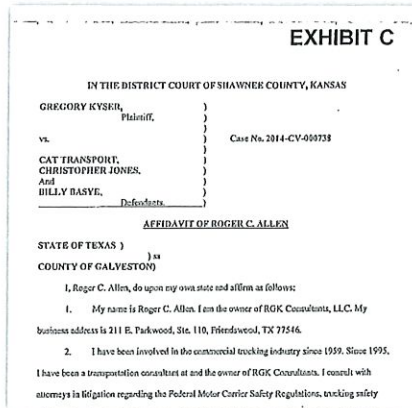
Armed with Mr. Allen's affidavit and deposition, along with supplemental information from Mr. Sievers, we had to go to Court again for a lengthy hearing on our Motion for Leave to Amend the Petition and add a claim for punitive damages. The Court was troubled by the fact that there was very little case law regarding a submission for punitive damages based upon a lack of information as opposed to overt, egregious conduct.

Nevertheless, after taking the matter under advisement, the Court granted our Motion in a written Order. I believe the reasoning is sound and the basis for allowing a punitive damage submission would have held up on appeal, especially after the numbers of opportunities the Judge gave the defense. Because we built a solid foundation for our request, I was confident that the trial would include a punitive damage submission that would have brought back a verdict reflecting the dangerous nature of the defendant's omissions. I believe it was critical to have an expert like Roger Allen testify about the reasons for the document retention requirements and how they particularly relate to commercial carrier safety.

Mr. Allen then provided the critical testimony that the failure to provide documentation of the safety measures equated to a failure to actually perform them. Of

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course, our position was bolstered by the fact that even after all of the motions and hearings, the defense did not come forward with any supplemental evidence indicating that they in fact had checked the driver's history, maintained a current medical certificate, verified the driver's license status and other critical measures. Had the trucking company actually done these but simply not had the documentation, I suspect they would have provided some evidence of the same. Its failure to do so helped to convince the Judge that this was more than a lack of documentation – it was a conscious failure to satisfy Federal Motor Carrier Safety Regulations.

CONCLUSION

I hope the Order and Affidavit (to be available on the TLG website) assists others in obtaining similar rulings. It is important for Courts to consider and recognize that safety regulations and verified documentation that they were followed directly affect roadway safety. The failure to document and verify that those safety regulations were followed should be given the same weight and effect as proof of the object failure to perform those tasks.

Steve Gorny is the founding member of The Gorny Law Firm. In 2006, Steve and a former partner obtained the seventh largest trial verdict in the United States, and the largest non-punitive wrongful death verdict in Missouri history. In addition, following two years of dedicated representation, Steve led the trial team that obtained a verdict of \$6,000,000 to help a church secretary and her family after the negligence of others deprived her of the use of her legs. In another case, after a week long trial, a jury found in favor of Steve's client and awarded the largest medical negligence verdict in Cole County, Missouri. Steve is a member of the Multi-Million-Dollar Advocates Forum, which is limited to attorneys who have obtained multi-million dollar verdicts and settlements. Less than one percent of US lawyers are members.

Steve is a member of the Missouri Bar, the Kansas Bar Association, the Kansas City Metropolitan Bar Association, the American Association of Justice and Trial Lawyers for Public Justice. He currently serves on the Executive Committee and Board of Governors of the Missouri Association of Trial Attorneys and is the President Elect. Steve also serves MATA's community outreach branch as the chairman of Missouri Trial Lawyers Care. He is also a member of AAJ's Interstate Trucking Litigation Group and The Association of Interstate Trucking Lawyers of America. Steve has been selected to the prestigious Best Lawyers in America every year since 2009. He has been selected as a Missouri and Kansas Super Lawyer every year since 2006. He has been named to Kansas City's Best of the Bar, and is listed as a Top 100 Attorney in Missouri and Kansas and a Top 50 Attorney in Missouri.

