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Car Wreck Case Law Update:

Seatbelts, Tow Trucks, & Cows in the Road

Morgan A. McPheeters

mmcpheeters@texasappeals.com

Dallas: PO Box 224626, Dallas, TX 75222
(214) 946-8000 | (214) 946-8433 (fax)

Houston: 1005 Heights Blvd., Houston, TX 77008
(713) 529-0048 | (713) 529-2498 (fax)

Seatbelts

Nabors Well Servs. Ltd. v. Romero,

456 S.W.3d 553 (Tex. 2015)

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Nabors Well Servs. v. Romero

Facts:

- Collision between a Nabors Well Services truck and a Chevy Suburban
- One passenger killed, the rest injured and ejected
- Up to 7 of the 8 passengers were *not* wearing seatbelts

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Nabors Well Servs. v. Romero

Procedural History:

- The families filed suit against Nabors and the truck driver
- Nabors sought to offer expert testimony of nonuse of seatbelts
- Trial court excluded all evidence of nonuse of seatbelts, following SCOTX precedent in *Carnation Co. v. Wong*, 516 S.W.2d 116 (Tex. 1974)
- Jury found Nabors 51% and plaintiff driver 49% responsible; awarded plaintiffs $2.3M.

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Nabors Well Servs. v. Romero

Holding:

- Relevant evidence of use or nonuse of seatbelts and relevant evidence of a plaintiff's pre-occurrence, injury-causing conduct generally, is admissible for purpose of apportioning responsibility, provided that the plaintiff's conduct caused or was a cause of his damages.

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Nabors Well Servs. v. Romero

Analysis:

- Seatbelt evidence had been inadmissible in car wreck cases for 40+ years
- Why?
  - Offered a safe-harbor from harshness of the old contributory negligence scheme
  - The failure to wear seatbelt could not *cause* a car wreck
  - 1985 – 2003: evidence of seatbelt use or nonuse statutorily prohibited by Legislature

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Nabors Well Servs. v. Romero

Analysis, cont'd:

- But today…
  - Under proportionate responsibility framework, P can recover so long as P's fault does not exceed 50%
  - Seatbelts are required by law and a part of daily life
  - Most importantly: change in focus from occurrence-causing conduct vs. injury-causing conduct

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Analysis, cont'd:

- Sec. 33.003(a) and 33.011(4) focus on assigning responsibility for the "harm for which recovery of damages is sought" (personal injury or death)
- While not wearing a seatbelt cannot cause a wreck, it can exacerbate a plaintiff's injuries or lead to his death.
- Question is not just who caused the car wreck, but also who caused the plaintiff's injuries?

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Nabors Well Servs. v. Romero

What does this mean for you?

- "As with any evidence, seat-belt evidence is admissible only if it is relevant." *Nabors,* at 563. *See* Tex. R. Evid. 401, 402.
- D can establish relevance of seat-belt nonuse only with evidence that the nonuse caused or contributed to cause the P's injuries
- Expert testimony often required
- Even if relevant, subject to exclusion under Rule 403
- Holding not limited to seatbelts – other possible "pre-occurrence, injury causing conduct"

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Causation

JLG Trucking, LLC v. Garza,

466 S.W.3d 157 (Tex. 2015)

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JLG Trucking, LLC v. Garza

Facts & Procedural History:

- Plaintiff involved in 2 car wrecks, 3 months apart
- Plaintiff sued Driver #1 and sought to prove that Driver #1's negligence caused her neck injuries, medical expenses, and other damages
- Driver #1 argued that Plaintiff's injuries were (1) degenerative and not trauma-related at all or, alternatively, (2) caused only by Wreck #2.

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JLG Trucking, LLC v. Garza

Facts & Procedural History, cont'd:

- Trial court excluded all evidence of Wreck #2 on relevance grounds
  - Driver #1 made offer of proof
- Jury found for Plaintiff.
- Court of appeals affirmed, holding trial court did not abuse its discretion in excluding Wreck #2 because expert testimony would be required to establish any causal link between Wreck #2 and Plaintiff's injuries.

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Holding:

- Evidence of the second wreck was admissible because it was relevant to the central issue of whether the defendant's negligence caused the plaintiff's damages.

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JLG Trucking, LLC v. Garza

Analysis:

- Plaintiff has the burden to prove causation
  - Requires P to prove both that Driver #1 caused Wreck #1 *and* that Wreck #1 caused P's injuries
  - Part of P's burden is to exclude with reasonable certainty other plausible causes of her injuries.
  - That Driver #1 chose to present expert testimony to support theory doesn't relieve P's burden
- Driver #1 was entitled to present evidence of Wreck #2 to the jury
- Court of appeals conflated relevance w/ evidentiary sufficiency and tried to shift the burden of proof to Defendant

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Loss of Use Damages

J & D Towing, LLC v. American Alternative Ins. Corp.,

No. 14-0574, --- S.W.3d ---, 2016 WL 91201, (Tex. 2016)

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J & D Towing v. Am. Alt. Ins. Corp.

Facts & Procedural History:

- Negligent underinsured driver crashed into tow truck company's only tow truck and destroyed it
- Tow truck company settled for negligent driver's $25k liability policy, then sued UIM/UM carrier for additional loss-of-use damages
- Carrier objected to jury charge, arguing that loss-of-use damages unavailable under Texas law

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J & D Towing v. Am. Alt. Ins. Corp.

Procedural History, cont'd:

- Trial court overruled the objection and jury awarded damages for loss-of-use. Trial court denied carrier's motion for JNOV.
- Waco Court of Appeals reversed, holding trial court abused its discretion in submitting the issue to the jury and denying JNOV

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J & D Towing v. Am. Alt. Ins. Corp.

Issue:

- In addition to recovering the fair market value of the truck immediately before the accident, may the tow truck company recover loss-of-use damages, such as lost profits?

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J & D Towing v. Am. Alt. Ins. Corp.

Holding:

- Yes, the owner of personal property that has been totally destroyed may recover loss-of-use damages in addition to the fair market value of the property immediately before the injury.

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J & D Towing v. Am. Alt. Ins. Corp.

Analysis:

- Guiding principle of Texas tort law: "compensation for the injury done"
- Consequential damages inquiry looks to make the P whole for economic injury that flows naturally, but not necessarily from the loss of personal property
- Loss-of-use damages incurred during the period of deprivation satisfy the principle of full and fair compensation

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J & D Towing v. Am. Alt. Ins. Corp.

Limits on loss-of-use damages:

- Not "too remote"
  - Foreseeable and directly traceable to the tortious act
- Not "speculative"
  - Mathematical exactness not required, but must rise above pure conjecture
- May not be awarded for "an unreasonably long period of lost use"
  - No "opportunistic dilly-dallying at the expense of the defendant"

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TTCA Election of Remedies

Molina v. Alvarado,

463 S.W.3d 867 (Tex. 2015)

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Molina v. Alvarado

Facts:

- City of McCamey employee was driving city vehicle under influence of alcohol
- Strikes Plaintiff's vehicle

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Molina v. Alvarado

Procedural History:

- Plaintiff sued the City for negligence and negligence per se
- Original Petition alleged that Employee was in course & scope of employment and the City was vicariously liable.
- City asserted immunity
- Plaintiff amended petition to add Employee as add'l defendant, adding alternative argument that Employee was also personally liable.

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Molina v. Alvarado

Procedural History, cont'd:

- Employee moved for summary judgment under TTCA election of remedies provision, arguing that Plaintiff had previously made irrevocable election to sue the City and was barred from suing Employee too.
- Trial court denied Employee's MSJ.
- Court of Appeals affirmed.

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Holding:

- When Plaintiff filed suit and initially named only the governmental unit itself, not the employee, this was an irrevocable election under the TTCA and immediately and forever barred any suit or recovery against the individual employee.

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Analysis:

- Under Tex. Civ. Prac. & Rem. Code Sec. 101.106, a suit against an employee may or may not be a suit against the governmental unit. If you sue the employee first in their official capacity, you have a window to amend pleadings to substitute the governmental unit (30 days from the filing of a motion to dismiss).
- But the opposite is *not* true. If you sue the government first, you have irrevocably elected your defendant.

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Molina v. Alvarado

What does this mean for you?

- Proceed with caution before filing suit in a TTCA case!
- Supreme Court says: If you have insufficient info to determine if a governmental employee was acting w/in the course & scope of her employment, sue the EMPLOYEE first and "await a factual resolution of that question."
  - If you sue the GOVERNMENT first, you are choosing your defendant before being required to do so by the election of remedies provision. That choice is an irrevocable election.
  - But not clear how this "factual resolution" would practically work…

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Spoliation

- *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014);
- *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917 (Tex. 2015)

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Brookshire Bros. & Wackenhut

Facts:

- *Brookshire Bros.* – Slip and fall case where premises owner retained the requested portion of surveillance video, but allowed the rest of be auto erased
- *Wackenhut* – Bus owned by Wackenhut collided with plaintiff's car. Bus had video cameras that might have captured the crash, but was not preserved and auto erased

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Brookshire Bros. & Wackenhut

SCOTX creates two-step process for spoliation analysis:

- (1) The court must determine whether the party spoliated evidence, and
- (2) If spoliation occurred, court must assess the appropriate remedy
- To conclude a party spoliated evidence requires findings that:
  - (1) the party had a duty to reasonably preserve evidence, and
  - (2) the party intentionally or negligently breached that duty by failing to do so
- Trial court has "broad discretion," but remedy must be proportionate to harm

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Brookshire Bros. & Wackenhut

Nonetheless, SCOTX held in both cases:

- The imposition of the "severe sanction" of a spoliation instruction was an abuse of discretion which probably caused the rendition of an improper judgment. Reverse and remand for new trial.

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Brooks Bros. & Wackenhut

What does this mean for you?

- Do not put spoliation instruction in your jury charge!
  - The risk of the instruction being erroneously submitted is too great.
  - *See* PJC Negligence 1.12 comment at 28
- Can still use other spoliation sanctions strategically
- Give careful consideration to the sanction you ask for and the sanction the court awards.

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Factoring

Katy Springs & Mfg., Inc. v. Favalora,

No. 14-14-00172-CV, --- S.W.3d ---, 2015 WL 5093232, (Tex. App.—Houston [14th Dist.] 2015, pet. filed)

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Katy Springs & Mfg. v. Favalora

Facts:

- Personal injury case involving a worker's compensation nonsubscriber
- Plaintiff was injured while working on a manufacturing line producing industrial springs. Filed suit against employer.
- Plaintiff was uninsured and received medical services for his injuries. P testified that he owed in excess of $200k.

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Katy Springs & Mfg. v. Favalora

Facts, cont'd:

- P assigned to his medical providers his interest in any proceeds that might be recovered through his pending lawsuit.
- P's medical providers sold, at a discount accounts receivable to MedStar Funding, a company engaged in the business of accounts receivable financing, aka "factoring"
- Evidence showed that P remained liable for the full value of the services rendered

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Katy Springs & Mfg. v. Favalora

Issue:

- Whether the trial court erred in admitting invoices showing the full amounts charged by the medical providers rather than the amounts the medical providers received in return for selling their accounts receivable to MedStar.

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Katy Springs & Mfg. v. Favalora

Holding:

- Evidence showing the *full value* of the services received by Plaintiff was admissible.
- "In a factoring case, where the record indicates that the claimant remains liable for the amounts originally billed by the medical provider, such amounts are recoverable medical expenses under § 41.0105, and evidence showing the amounts billed by the medical provider is admissible." *Id.* at 15.

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Paid or Incurred

Guzman v. Jones,

804 F.3d 707 (5th Cir. 2015)

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Guzman v. Jones

Facts & Procedural History:

- Car wreck between truck driver and Plaintiff
- Parties agreed that truck driver was at fault and employer vicariously liable
- Trial was solely on issue of damages

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Guzman v. Jones

Facts & Procedural History:

- Plaintiff presented evidence of his medical bills at trial
- Plaintiff was uninsured, not a Medicaid participant, & received no workers' compensation payments
- Defendant moved to exclude the bills, arguing that Plaintiff was *eligible* for Medicaid and workers' compensation.

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Guzman v. Jones

Issue:

- "[W]hether an uninsured plaintiff who may have been eligible for insurance benefits but did not have insurance at the time of his injury or treatment is barred from presenting evidence of the list prices he was charged by the hospital and is obligated to pay." *Id.* at 711.

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Guzman v. Jones

Holding:

- No. The trial court did not err in allowing evidence of Plaintiff's medical bills because the reduced prices that he *may* have received had he participated in health benefit or insurance programs for which he *may* have been eligible are irrelevant under Texas law.

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Guzman v. Jones

Analysis:

- Erie Guess based on *Big Bird Tree Serv. v. Gallegos* (Dallas 2012) and *Metro. Transit Auth. v. McChristian* (Houston 14th, 2014)
- P was actually billed the amounts awarded by the jury for his medical expenses
- P remained under a legal obligation to pay the billed amounts to his medical providers
- Therefore, the reduced prices he *may* have gotten are irrelevant.

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The Cow in the Road

Archer v. Tunnell,

No. 05-15-00459-CV, 2016 WL 519632 (Tex. App.—Dallas Feb. 9, 2016, no pet. h.)

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Archer v. Tunnell

Facts:

- Bobby Tunnell was a passenger in pickup truck
- Cattle owned by Richard Archer strayed off Archer's property and onto the roadway
- Pickup struck at least 1 cow and rolled 8 times
- Tunnell was severely injured

Archer v. Tunnell

Procedural History:

- Tunnell filed suit against Archer
- Archer filed a motion to dismiss, arguing that the suit alleged a health care claim under Chapter 74 of Tex. Civ. Prac. & Rem. Code because (1) the suit alleged the violation of safety standards, and (2) *Archer is a retired physician*.
- Archer requested dismissal because Tunnell had not filed a Chapter 74 expert report
  - Also filed MSJ arguing that court lacked jurisdiction to hear claims involving retirement plans b/c ERISA preempts state law

Archer v. Tunnell

Procedural History, cont'd:

- Trial court denied the motion to dismiss for lack of a Chapter 74 expert report because a cow in the road is not a med. mal. Claim.
- Archer filed notice of appeal
- SCOTX issued opinion in *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496 (Tex. 2015), concluding that for a suit to be a health care liability claim, there must be a "substantive nexus between the safety standards allegedly violated and the provision of health care." (*Ross* at 504).

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Archer v. Tunnell

Procedural History, cont'd:

- Tunnell's counsel sent two letters to Archer, stating that his appeal lacks any good faith basis in law or fact and warning that Tunnell would file a motion to dismiss and for sanctions if Archer did not dismiss his appeal
- Archer acknowledged that *Ross* eliminated his argument, but decided to go forward with the appeal to challenge the trial court's oral denial of summary judgment on the ERISA preemption argument
- Tunnell filed a motion to dismiss the appeal and request for sanctions

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Archer v. Tunnell

Holding:

- Archer's appeal was frivolous.
  - No reasonable grounds to believe the case could be reversed on the Chapter 74 argument after *Ross*
  - No reasonable grounds to believe that the case could be reversed on the ERISA preemption argument because interlocutory appeal requires a written order and the trial court orally denied Archer's MSJ

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Archer v. Tunnell

Holding, cont'd:

- "In these circumstances, we conclude that appellants and their counsel's actions are so *egregious* as to warrant the award to Tunnell of just damages from appellants and their counsel for their pursuit of this frivolous appeal." *Id.* at *4.
- Awarded Tunnell sanctions of $2,205 in attorney's fees for preparation of motion to dismiss.
- Granted leave for Tunnell to request damages from the date the appeal became frivolous and egregious.

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Archer v. Tunnell

What does this mean for you?

- Ch. 74 is a poorly written statute that has allowed gamesmanship and statutory abuse for the sole purpose of *delay.*
- It has spawned some frivolous arguments that even tort reformers cannot get behind—such as the arguments raised here.
- Courts are finally getting sick of these cases and are even willing to award sanctions for egregious conduct.

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Archer v. Tunnell

But to be clear…

- The defendants in this case got exactly what they wanted: DELAY
- Filed the motion to dismiss on the eve of trial
- Now, 1.5 years later and still no trial setting
- So, while sanctions are a helpful option, still not enough to address the heart of the problem

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Dallas:
PO Box 224626, Dallas, TX 75222
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Houston:
1005 Heights Blvd., Houston, TX 77008
(713) 529-0048 | (713) 529-2498 (fax)