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SEAT BELTS AND POLICE OPINIONS: TWO OUTCOME DETERMINATIVE ISSUES

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I. INTRODUCTION

Evidence about the wearing of seat belts and the investigating officer's opinions has the potential to be outcome determinative in a car crash case.

In *Nabors Well Services v. Romero*, 456 S.W.3d 553 (Tex. 2015), the Texas Supreme Court upended more than 40 years of precedent when it allowed evidence of a plaintiff's non-use of seat belts to reduce a plaintiff's recovery in a car crash case. Nevertheless, defendants in the wake of *Nabors* cannot assume that a trial court necessarily must admit seat belt evidence. *Nabors* erects some hurdles for the admissibility of the evidence: 1) defendants must establish its relevance by showing that non-use contributed to cause the plaintiff's injuries, 2) the trial court must first scrutinize the evidence for relevance outside the presence of the jury, and 3) the evidence is subject to exclusion as overly prejudicial under rule of evidence 403. Further, although the *Nabors* court declined to say that expert testimony will always be required to establish the relevance of the evidence, the court noted that "expert testimony will often be required."

The reported cases give contradictory and inconsistent answers to many of the questions related to police officer testimony and reports. Nevertheless, a thorough understanding of the reported cases may give the trial attorney the ability to maximize the impact of any helpful testimony provided by the officer and the ability to minimize the impact of any harmful testimony.

II. SEAT BELTS

In *Nabors Well Services v. Romero*, 456 S.W.3d 553 (Tex. 2015), the Texas Supreme Court upended more than 40 years of precedent when it allowed evidence of a plaintiff's non-use of seat belts to reduce a plaintiff's recovery in a car crash case. This evidence is not now automatically admissible, however. The defendant must first show that the evidence is relevant, and the probative nature of the evidence must outweigh its prejudicial nature.

The Texas Supreme Court first addressed the admissibility of seat belt evidence in 1973, in *Kerby v. Abilene Christian College*, 503 S.W.2d 526 (Tex. 1973). The *Kerby* court sharply distinguished between negligence contributing to causing a crash and negligence contributing to causing a plaintiff's damages. *Kerby*, 503 S.W.2d at 258. The court excluded seat belt evidence

because it reasoned that any negligence in not wearing a seat belt could not be contributory negligence that contributed to causing the crash. *Id.*

One year later, in *Carnation Company v. Wong*, 516 S.W.2d 116 (Tex. 1974), the Texas Supreme Court stopped short of holding that there was no common law duty to wear seat belts. Instead, the court noted the prohibitive difficulty of admitting seat belt evidence under any of the existing legal theories, including contributory negligence, mitigation of damages, and apportionment of damages theories. *Carnation*, 516 S.W.2d at 117. The court then broadly held that plaintiffs in car crash cases should not have their damages reduced or mitigated because of their failure to wear seat belts. *Id.*

Carnation's common-law general prohibition of seat belt evidence to reduce a plaintiff's damages remained the rule in Texas until 1985. In that year, the Texas Legislature made it a criminal offense for anyone fifteen years or older to ride unbelted in a front seat, and the legislature made drivers responsible for belting children under fifteen years old riding in a front seat. Act of June 15, 1985, 69th Leg., R.S., ch. 804, Section 1, sec. 107C, 1985 Tex. Gen. Laws 2846, 2846-47. The 1985 statute also mandated that, "Use or non-use of a seatbelt is not admissible evidence in a civil trial." The statute's flat prohibition of seat belt evidence for any purpose went a step further than *Carnation*, which had prohibited its admissibility solely when it was used to reduce a plaintiff's damages recovery.

Then, in a 2003 as part of sweeping "tort reform" changes in HB4, the Texas Legislature simply repealed the statute's prohibition of the admissibility of seat belt evidence, without taking any legislative position on whether such evidence was now admissible. Act of June 11, 2003, 78th Leg., R.S., ch. 204, Section 8.01, 2003 Tex. Gen. Laws 863, 863 (repealing TEX. TRANSP. Code Sections 545.412(d), 545.413(g). This repeal revived the dormant, but never overruled holdings of *Kerby* and *Carnation*.

In *Nabors Well Services, LTD v. Romero*, 456 S.W.3d 553 (Tex. 2015), the Texas Supreme Court considered whether the sharp distinction that it drew between occurrence-causing and injury-causing negligence in *Kerby* was still viable, and whether a plaintiff's failure to wear a seat belt could reduce a plaintiff's damages recovery, even though it did not cause the accident.

Romero was a car crash case in which a Nabors Well Services truck slowed to make a left hand turn, and the plaintiffs' Suburban with eight occupants pulled into the oncoming lane of traffic in an attempt to pass the Nabors truck. The Nabors truck hit the Suburban, which then left the highway and rolled multiple times. Although the evidence was conflicting on exactly which occupants were unbelted and which were ejected from the Suburban, there was no dispute that a number of the occupants were unbelted and ejected. One passenger was killed and all others suffered injuries.

The trial court, relying in part on *Carnation*, excluded expert testimony from Nabors' biomechanical engineer that seven of the eight passengers in the Suburban were unbelted, that

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