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# *Nolan & Ready*—“Settling” for Less than Perfect in Illinois when Determining the Role Defendants Play in the Litigation After They Settle

I. INTRODUCTION .....	35
II. BACKGROUND.....	39
A. THE JOINT AND SEVERAL LIABILITY STATUTE.....	39
1. <i>Facts of Ready v. United/Goedecke Services, Inc.</i> .....	46
B. THE SOLE PROXIMATE CAUSE DEFENSE.....	50
1. <i>Facts of Nolan v. WEIL-McLain</i> .....	51
III. ANALYSIS .....	54
A. THE EXISTING LAW UNDER <i>READY I</i> AND <i>NOLAN</i> DOES NOT PROTECT MINIMALLY CULPABLE DEFENDANTS.....	54
1. <i>Deep-Pocketed Defendants and Plaintiffs Will Suffer Under the Ready I Ruling</i> .....	55
2. <i>Excluding Settled Defendants from the Jury Verdict Form when Apportioning Fault Violates the Remaining Defendants’ Rights</i> .....	57
B. THE EXISTING LAW UNDER <i>READY I</i> AND <i>NOLAN</i> IS UNWORKABLE IN PRACTICE.....	59
IV. THE EXISTING LAW MUST BE REVISED .....	61
A. THE <i>READY I</i> RULING SHOULD BE REVERSED .....	61
1. <i>Settled Defendants Should Be Included on the Jury Verdict Form in Order to Conform with Other Legislative Policies</i> .....	61
2. <i>Settled Defendants Should Not Be Responsible for Additional Contribution</i> .....	63
B. THE SOLE PROXIMATE CAUSE INSTRUCTION SHOULD BE ABOLISHED.....	63
V. CONCLUSION .....	64

## I. INTRODUCTION

For years, controversy has plagued Illinois courtrooms over the role defendants continue to play in the litigation after they settle with the plaintiff.<sup>1</sup> Plaintiffs and defendants alike have questioned whether during trial

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1. See, e.g., *Leonardi v. Loyola Univ. of Chi.*, 658 N.E.2d 450 (Ill. 1995) (questioning whether evidence of the conduct of settled defendants may be submitted by the re-

the remaining defendants may submit evidence of the settled defendants' culpability,<sup>2</sup> and whether settled defendants are still "defendants sued by the plaintiff,"<sup>3</sup> to be included on jury verdict forms for apportioning fault.<sup>4</sup>

In its 2008-2009 term, the Illinois Supreme Court decided two cases that purportedly answered these questions: *Nolan v. WEIL-McLain*<sup>5</sup> (*Nolan*) held that a remaining defendant who alleges zero culpability in any tort action may submit evidence of settled defendants' conduct in support of the defendant's sole proximate cause defense,<sup>6</sup> and *Ready v. United/Goedecke Services, Inc.*<sup>7</sup> (*Ready I*)<sup>8</sup> held that settled defendants cannot be included on jury verdict forms when apportioning fault.<sup>9</sup>

While these two decisions should have cleared up the controversy surrounding the role defendants may have in the litigation after settling, they did not. The *Ready I* decision held that settled defendants may not be included on the jury verdict form under any circumstance.<sup>10</sup> The *Nolan* decision, however, effectively disarms the *Ready I* decision, because a jury, having been exposed during trial to evidence of the conduct of settled defendants, will inevitably take that evidence into consideration when apportioning fault, despite the fact the settled defendants' names do not appear on the jury verdict form, and notwithstanding instructions from the judge to disregard the evidence.<sup>11</sup>

Another reason for the continuing controversy—the *Ready I* decision is unjust in its application, because it does not allow the jury to properly distribute the blame among all responsible parties, which results in an unrealis-

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maintaining defendants); see also *Blake v. Hy Ho Rest.*, 652 N.E.2d 807 (Ill. App. Ct. 1995) (questioning whether settled defendants may be included on jury verdict forms).

2. *Leonardi*, 658 N.E.2d at 454.

3. 735 ILL. COMP. STAT. 5/2-1117 (2009).

4. *Lombardo v. Reliance Elevator Co.*, 733 N.E.2d 874, 874 (Ill. App. Ct. 2000).

5. 910 N.E.2d 549 (Ill. 2009).

6. *Id.* at 564. The sole proximate cause defense is also known as the "empty chair defense." *Leonardi*, 658 N.E.2d at 455.

7. 905 N.E.2d 725 (Ill. 2008), modified on denial of reh'g, (March 23, 2009).

8. The *Ready* case was reheard by the Illinois Supreme Court early in 2010, and the published decision was released on Oct. 21, 2010. *Ready v. United/Goedecke Serv., Inc.*, No. 108910, 2010 WL 4126244 (Ill. Oct. 21, 2010). For clarity, *Ready I* will refer to the 2008 decision that was modified in 2009, and *Ready II* will refer to the 2010 decision.

9. 905 N.E.2d at 734.

10. *Id.* at 733.

11. See, e.g., *Krulewitch v. U.S.*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."); see also Jonathan D. Casper & Kennette M. Benedict, *The Influence of Outcome Information and Attitudes on Juror Decision Making in Search and Seizure Cases*, in *INSIDE THE JUROR, THE PSYCHOLOGY OF JUROR DECISION MAKING*, 65, 68 (Reid Hastie ed. 1993) ("[Jurors] cannot erase previously learned information. . . . Furthermore, direct instructions to ignore the potentially biasing information rarely work.").

tic distribution of fault among the remaining defendant/s and the plaintiff/s. This result is in direct contravention to the Illinois Legislature's purpose for creating the joint and several liability statute,<sup>12</sup> which is to protect the minimally culpable defendant from having to pay the entire amount of damages.<sup>13</sup>

This Note focuses on the combined ramifications of the *Ready I* and *Nolan* decisions, and argues that the *Ready I* decision should be overturned in order to allow settled defendants to be included on the jury verdict form, so that a proper distribution of fault may be achieved.<sup>14</sup> By including settled defendants in the process of apportioning fault, the courts will be keeping with both the original intent of the Illinois Legislature, and will be keeping with precedent set by earlier Illinois Supreme Court decisions.<sup>15</sup>

This Note further argues that the *Nolan* decision creates an unfair loop-hole in the *Ready I* decision for minimally culpable defendants who allege no culpability and utilize the sole proximate cause defense. This is because the jury, once presented with evidence of the conduct of settled defendants, will apportion fault according to all the available evidence, despite the fact that the settled defendants' names do not appear on the jury verdict form.<sup>16</sup>

Accordingly, this Note suggests that the sole proximate cause instruction<sup>17</sup> should be disallowed in Illinois courts, as the instruction provides a

12. See 735 ILL. COMP. STAT. 5/2-1117 (2009).

13. *Unzicker v. Kraft Food Ingrid. Corp.*, 783 N.E.2d 1024, 1032-34 (Ill. 2002); see also *Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 746 (Ill. 2008) (Garman, J. dissenting) (stating that "imposing excessive liability on a minimally responsible defendant . . . is not consistent with the public policy of this state as expressed by the legislature.").

14. See *supra* note 8; see also discussion on this decision *infra* pp. 17-18.

15. See *Unzicker*, 783 N.E.2d at 1032-34; see also 5/2-1117.

16. See *supra* note 11.

17. Illinois Pattern Jury Instructions, Civil, §§ 12.04, 12.05 (2009).

More than one person may be to blame for causing an injury. If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.

[However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.]

*Id.*

If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that something else may also have been a cause of the injury.

[However, if you decide that the sole proximate cause of injury to the plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant.]

backdoor to allowing the jury to consider the fault of settled defendants, and because it is nonsensical for a court not to allow a jury to apportion some fault to *named* settled defendants, but to allow a jury to apportion all the fault to an *unnamed* entity.<sup>18</sup> Rather, given a sufficient showing of evidence by the remaining defendant, settled defendants should be included on the jury verdict form in order to allow for an equitable distribution of fault among all responsible parties. The distribution of fault on the jury verdict form should not result in payment from the settled defendants,<sup>19</sup> nor should it result in settled defendants being burdened with unnecessary discovery costs,<sup>20</sup> but rather it will allow for a more equitable appraisal of whom exactly is to blame, so that the remaining defendant and plaintiff are not left holding a substantial portion of unwarranted fault.

In Part II, this note provides a history of the Illinois joint and several liability statute,<sup>21</sup> an overview of the case law emanating from that statute leading up to the *Ready I* decision, and the facts of the *Ready I* case. Part II also provides information regarding the sole proximate cause instruction,<sup>22</sup> how defendants utilize the sole proximate cause defense, and the facts of the *Nolan* case.

Part III provides an analysis of why the *Ready I* court decided the case incorrectly, ramifications of the *Ready I* decision, and an explanation of why the new law simply will not work in light of the *Nolan* decision.

Part IV argues that the existing law should be revised to allow for an equitable apportionment of fault by placing settled defendants on the jury verdict form, and argues that the sole proximate cause instruction should be removed from Illinois courts.

Part V concludes by emphasizing that the joint and several liability statute was intended to protect the minimally liable defendant, and only through the reversal of the *Ready I* decision and the removal of the sole proximate cause instruction will the minimally liable defendant receive that protection.

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*Id.*

18. Compare *Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 733 (Ill. 2008) (holding that named settled defendants cannot be listed on the jury verdict form), with *Nolan v. WEIL-McLain*, 910 N.E.2d 549, 562 (Ill. 2009) (stating that a sole proximate cause instruction is a defense that establishes “proximate cause in the act of solely another not named in the suit”).

19. 740 ILL. COMP. STAT. 100/2(d) (2009). This statute is part of the Contribution Act, which is codified at 740 ILL. COMP. STAT. 100/0.01-5 (2009).

20. See *Lombardo v. Reliance Elevator Co.*, 733 N.E.2d 874, 885 (Ill. App. Ct. 2000).

21. 735 ILL. COMP. STAT. 5/2-1117 (2009).

22. See *supra* note 17.

## II. BACKGROUND

### A. THE JOINT AND SEVERAL LIABILITY STATUTE

Section 735 ILCS 5/2-1117<sup>23</sup> (2-1117) of the Illinois Code of Civil Procedure<sup>24</sup> deals with apportionment of fault, and prescribes the formula for determining joint and several liability: any defendant found to be twenty-five percent or more culpable will be jointly and severally liable; any defendant found to be less than twenty-five percent culpable will be only severally liable.<sup>25</sup> In passing section 2-1117 as part of the Tort Reform Act of 1986,<sup>26</sup> the Illinois Legislature intended to modify the common law rule of joint and several liability so that a defendant who was minimally at fault

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23. 735 ILL. COMP. STAT. 5/2-1117 (2009). Formerly known as Ill.Rev.Stat. 1991, ch. 110, § 2-1117; part of the “Tort Reform Act of 1986,” the statute became effective November 25, 1986 through Pub. Act 84-1431, Art. 5, § 1. It was later amended by Pub. Act 89-7—the “Tort Reform Act of 1995.” Pub. Act 89-7 was later held to be unconstitutional by *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1064 (Ill. 1997). The statute was again amended by Pub. Act 93-10, § 5 and Pub. Act 93-12, § 5, which became effective on June 4, 2003.

Although the *Ready I* court decided that the 1986 version of 2-1117 was in effect at the time of plaintiff’s accident, *Ready*, 905 N.E.2d at 729, the court decided that the current version, amended in 2003 and included below, also does not allow for settling defendants to be included on the jury verdict form. *Id.* at 734.

Except as provided in Section 2-1118, in actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff’s past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant except the plaintiff’s employer, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants except the plaintiff’s employer, shall be jointly and severally liable for all other damages.

§ 2-1117.

24. 735 ILL. COMP. STAT. 5 (2009).

25. *Id.* at § 2-1117.

26. Tort Reform Act of 1986, Pub. Act 84-1431 Art. 5, § 1, 1986, Ill. Laws 3756, formerly codified at Ill. Rev. Stat. 1991, ch. 110, § 2-111; *see also* R. Courtney Hughes, *Several Liability and the Structural Work Act*, 82 ILL. B.J. 608, 608 (1994).

would not be required to pay the entire amount of the plaintiff's non-medical damages.<sup>27</sup>

Under the common law, before the Tort Reform Act of 1986 was passed, culpable defendants were held to be jointly and severally liable, regardless of their respective shares of liability.<sup>28</sup> Accordingly, the plaintiff could recover the full amount of damages from any or all of the defendants, even if the defendant's liability was comparatively low.<sup>29</sup> The reasoning behind this policy was to overly burden a partially liable defendant as opposed to under-compensating an innocent plaintiff.<sup>30</sup>

Illinois has been working towards fair apportionment of fault among all responsible parties since 1977, when the Illinois Supreme Court abrogated the law of contributory negligence<sup>31</sup> in *Skinner v. Reed-Prentice Division Package Machinery Co.*<sup>32</sup> The court in *Skinner* recognized contribution among joint tortfeasors, and began the process of apportioning liability according to the party's fault.<sup>33</sup> The Illinois Supreme Court's view on fair apportionment of fault was clear: "There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone . . . while the latter goes scot free."<sup>34</sup>

The next step towards fair apportionment of fault came in 1981 when, in *Alvis v. Ribar*,<sup>35</sup> the Illinois Supreme Court decided to allocate fault on a percentage basis among the defendants *and* the plaintiffs.<sup>36</sup> This adoption of "pure" comparative negligence<sup>37</sup> as a means of distributing fault indicated a

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27. *Unzicker v. Kraft Food Ingrid. Corp.*, 783 N.E.2d 1024, 1033 (Ill. 2002). The twenty-five percent rule does not apply to medical payments; any defendant found liable for any amount is jointly and severally liable for the entirety of the medical bills. *See id.* at 1029.

28. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1084 (Ill. 1997) (citing 3 F. HARPER, F. JAMES & O. GRAY, TORTS §§ 10.1, 10.2 (2d ed.1986) and W. KEETON, PROSSER & KEETON ON TORTS §§ 47, 50-52 (5th ed.1984).

29. *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197, 204 (Ill. 1983).

30. R. Courtney Hughes, *Several Liability and the Structural Work Act*, 82 ILL. B.J. 608, 608 (1994).

31. Under a contributory negligence system, a plaintiff's own negligence would preclude him from recovering damages; "the rule in Illinois was indivisible recovery – a plaintiff recovered all from a defendant or nothing." David B. Mueller & Jennifer L. Wolfe, *The Ready Answer: Settling Defendants' Fault Can't Be Used to Determine Joint Liability*, 97 ILL. B.J. 294, 295 (2009).

32. 374 N.E.2d 437 (Ill. 1977).

33. *Id.* at 442; The Joint Tortfeasor Contribution Act was codified by 740 ILL. COMP. STAT. 100/1 (2009).

34. *Skinner*, 374 N.E.2d at 442 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §50, at 307 (4th ed. 1971)).

35. 421 N.E.2d 886 (Ill. 1981).

36. *Id.* at 898.

37. *See id.* at 897 for a comprehensive discussion of "pure" versus "modified" comparative negligence.

clear movement in Illinois towards ensuring that losses were accurately distributed among *all* responsible parties.<sup>38</sup>

Unfortunately, as the little boy stuck one of his chubby fingers into a crack in the leaky dam, another leak sprung forth; in becoming a comparative fault state, the question arose as to whether the common law of joint liability<sup>39</sup> was still applicable.<sup>40</sup> It did not seem fair to find a defendant jointly liable for a plaintiff's damages now that the courts were accurately dividing liability among all culpable parties.<sup>41</sup> However, the Illinois Supreme Court ruled that comparative fault did not eliminate joint liability,<sup>42</sup> pointing to many other states that retained both simultaneously.<sup>43</sup>

But, the Illinois Legislature was not convinced that potential defendants were being adequately protected. Thus, for the next three years the legislature debated and passed a number of amendments to the Illinois Code of Civil Procedure that became collectively known as the Tort Reform Act of 1986.<sup>44</sup> Modified comparative negligence<sup>45</sup> and modified joint and several liability<sup>46</sup> were two modern Illinois jurisprudential tenets borne out of the Tort Reform Act of 1986.<sup>47</sup>

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38. Eileen M. Walsh & Eugene G. Doherty, *Section 2-1117: Several Liability's Effect on Settlement and Contribution*, 79 ILL. B.J. 122, 123 (1991).

39. *Coney v. JLG Indus.*, 454 N.E.2d 197, 204 (Ill. 1983) ("The common law doctrine of joint and several liability holds joint tortfeasors responsible for the plaintiff's entire injury, allowing plaintiff to pursue all, some, or one of the tortfeasors responsible for his injury for the full amount of the damages.").

40. *See id.* at 204-06.

41. *See Mueller & Wolfe, supra* note 31, at 295.

42. The *Coney* court gave four reasons for not eliminating joint liability: (1) "The feasibility of apportioning fault on a comparative basis does not render an indivisible injury 'divisible' for purposes of the joint and several liability rule;" (2) "In those instances where the plaintiff is not guilty of negligence, he would be forced to bear a portion of the loss should one of the tortfeasors prove financially unable to satisfy his share of the damages;" (3) "Even in cases where a plaintiff is partially at fault, his culpability is not equivalent to that of a defendant. The plaintiff's negligence relates only to a lack of due care for his own safety while the defendant's negligence relates to a lack of due care for the safety of others; the latter is tortious, but the former is not;" and (4) "Elimination of joint and several liability would work a serious and unwarranted deleterious effect on the ability of an injured plaintiff to obtain adequate compensation for his injuries." *Coney*, 454 N.E.2d at 205.

43. *Id.* at 206 ("We find nothing in *Alvis* . . . nor have we found persuasive judicial authority for the proposition that comparative negligence compels the abolition of joint and several liability.").

44. Tort Reform Act of 1986, Pub. Act 84-1431, art. 5, § 1, 1986, Ill. Laws 3756, formerly codified at Ill. Rev. Stat. 1991, ch. 110, § 2-1117.

45. 735 Ill. Comp. Stat. Ann. 5/2-1116 (2009). This statute changed Illinois from a "pure" comparative negligence state to a "modified" comparative negligence state—consequently, a plaintiff could only be barred from recovery, if contributory negligence was found to be fifty-one percent or more. *See id.*

46. 735 Ill. Comp. Stat. Ann. 5/2-1117 (2009). This statute limited joint liability for non-medical damages to only those defendants who were found to be twenty-five percent



Over the following years, the courts looked to the joint and several liability statute<sup>48</sup> to determine whether settled defendants and other parties were considered when apportioning fault, and decided this issue in a number of ways dependent on the specific circumstances surrounding each case.<sup>49</sup> With few exceptions, the case law has a distinct theme: protect minimally culpable defendants from having to pay entire damages awards.<sup>50</sup>

In *Alvarez v. Fred Hintze Construction*,<sup>51</sup> the appellate court held that a remaining defendant does not forfeit her rights under 2-1117 simply because the other defendants settled.<sup>52</sup> Quoting an Illinois Bar Journal article, the *Alvarez* court stated, “[T]he jury should still be able to assess the defendant's relative culpability, and if the defendant's level of fault falls below the 25 percent threshold, its liability is several only and is not affected by the plaintiff's settlement with the other tortfeasor.”<sup>53</sup>

Following this line of reasoning, the Illinois Supreme Court in *Lannom v. Kosco*<sup>54</sup> pointed to the decision in *Alvarez* with approval, additionally noting that 2-1117 does not prohibit the dismissal of settling defendants or third-party defendants, if that dismissal is otherwise appropriate.<sup>55</sup> Allowing a defendant, however, to reach a good-faith settlement with the plaintiff *and* allowing the jury to assess that settling defendant's culpability relative to the other defendants' culpability when apportioning fault, are *not* mutually exclusive allowances.<sup>56</sup> It is notable that this decision was reached after the court had already dismissed the counts against plaintiff's employer, leaving only one remaining defendant.<sup>57</sup> Therefore, when the court spoke about

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percent or more liable for the plaintiff's injuries; a defendant whose liability was found to be twenty-four percent or less was only severally liable for non-medical expenses. *See also* *Unzicker v. Kraft Food Inged. Corp.*, 783 N.E.2d 1024, 1036 (Ill. 2002) (discussing the purpose of a modified joint and several liability statute).

47. *See* *Mueller & Wolfe*, *supra* note 31, at 295.

48. § 5/2-1117.

49. *Compare* *Blake v. Hy Ho Rest., Inc.*, 652 N.E.2d 807, 811 (Ill. App. Ct. 1995) (rejecting the argument that settled defendants should be included on the jury verdict form for purposes of apportioning fault), *with* *Banovz v. Rantanen*, 649 N.E.2d 977, 985 (Ill. App. Ct. 1995) (holding that a settlement agreement does not abolish the remaining defendant's right to apportionment under 2-1117).

50. *See, e.g., Unzicker*, 783 N.E.2d at 1033.

51. 617 N.E.2d 821 (Ill. App. Ct. 1993).

52. *Id.* at 826.

53. *Id.* (quoting Eileen M. Walsh & Eugene G. Doherty, *Section 2-1117: Several Liability's Effect on Settlement and Contribution*, 79 ILL. B.J. 122, 125 (1991)) (citing Michael A. Pope & Jamie S. Freveletti, *Tort Reform Act*, 18 LOYOLA U. CHI. L.J. 839, 845-46 (1986)).

54. 634 N.E.2d 1097 (Ill. 1994).

55. *Id.* at 1101.

56. *See id.*

57. *See id.* at 1099.

assessing the “relative culpability”<sup>58</sup> of the remaining defendants, the court could only have intended that settled defendants be included in the final assessment of fault.<sup>59</sup> Assessing a defendant’s culpability relative only to himself or to only the plaintiff would not produce results consistent with the legislature’s original intent—to provide protection to the minimally responsible defendant.<sup>60</sup>

Conversely, *Blake v. Hy Ho Restaurant, Inc.*<sup>61</sup> held that settling defendants generally should not be included in the fault apportionment for purposes of determining several liability under 2-1117.<sup>62</sup> The appellate court in *Blake* read the opposite meaning into 2-1117 than the supreme court had in *Lannom*, holding that once a defendant settles, he ceases to be a defendant for purposes of apportionment as prescribed by 2-1117.<sup>63</sup> In the words of the *Blake* court: “To read dismissed defendants into section 2-1117 and require that they be apportioned fault after their dismissal would be a gross contortion of the legislative intent.”<sup>64</sup>

The ruling in *Blake* does not seem to have been what the Illinois Legislature had in mind, however, because the very same year *Blake* was decided, the legislature amended 2-1117 to say exactly the opposite of what the *Blake* court had just unequivocally stated the legislature’s intent to be.<sup>65</sup>

58. *Id.* at 1101.

59. Brief of Defendant-Appellee, *Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 725 (Ill. 2008) (No. 1-04-1762), 2007 WL 6822738 at \*19.

60. *Id.*; see also *Unzicker v. Kraft Food Ingrid. Corp.*, 783 N.E.2d 1024, 1033 (Ill. 2002).

61. 652 N.E.2d 807, 807 (Ill. App. Ct. 1995).

62. *Id.* at 811.

63. *Id.*

64. *Id.*

65. See Tort Reform Act of 1995, Pub. Act No. 89-7, § 2-1117 (1995) (codified at 735 ILL. COMP. STAT. ANN. 5/2-1117 (1995)). 89-7 was later held to be unconstitutional by *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1088 (Ill. 1997).

(a) In any action brought on account of death, bodily injury to person, or physical damage to property in which recovery is predicated upon fault as defined in Section 2-1116, a defendant is severally liable only and is liable only for that proportion of recoverable economic and non-economic damages, if any, that the amount of that defendant's fault, if any, bears to the aggregate amount of fault of all other tortfeasors, as defined in Section 2-1116 [*See infra* note 68], whose fault was a proximate cause of the death, bodily injury, economic loss, or physical damage to property for which recovery is sought.

(b) Notwithstanding the provisions of subsection (a), in any healing art malpractice action based on negligence or wrongful death, any defendants found liable shall be jointly and severally liable if the limitations on non-economic damages in Section 2-1115.1 of this Act are for any reason deemed or found to be invalid.

This amended statute made clear that on which the original statute was foggy—the legislature intended that settled defendants should be included in the apportionment of fault.

Public Act 89-7 (89-7), as part of the Tort Reform Act of 1995, codified proportional several liability and got rid of joint liability except in “healing art malpractice action[s].”<sup>66</sup> The preamble to 89-7 stated firmly that “it is the public policy of this State that a defendant should not be liable for damages in excess of its proportional share of fault.”<sup>67</sup> In accordance with this policy, the wording of the original statute was completely changed in order to apportion fault according to the “aggregate amount of fault of all other tortfeasors.”<sup>68</sup> This included settled defendants.<sup>69</sup>

Two years later, in *Best v. Taylor Machine Works*,<sup>70</sup> the Illinois Supreme Court held 89-7 to be wholly unconstitutional because section 2-1115.1<sup>71</sup> (another section of 89-7) capped damages awards at five hundred thousand dollars per plaintiff,<sup>72</sup> which the Illinois Supreme Court previously held to be unacceptable.<sup>73</sup> Since section 2-1117(b) relied upon section 2-1115.1,<sup>74</sup> and because 2-1117(b) was not able to be severed from 2-1117(a), the court ruled that 89-7 in its entirety was unconstitutional.<sup>75</sup> The court also noted that the amended version of 2-1117, which abolished joint and

Pub. Act No. 89-7, § 2-1117.

66. Pub. Act No. 89-7, § 2-1117(b) (1995) (codified at ILL. COMP. STAT. ANN. 5/2-1117(b) (1995)).

67. *Best*, 689 N.E.2d at 1088.

68. Tort Reform Act of 1995, Pub. Act No. 89-7, (1995). 735 ILL. COMP. STAT. ANN. 5/2-1116 (2009) defines “tortfeasor” as

Any person, excluding the injured person, whose fault is a proximate cause of the death, bodily injury to person, or physical damage to property for which recovery is sought, regardless of whether that person is the plaintiff’s employer, regardless of whether that person is joined as a party to the action, and regardless of whether that person may have settled with the plaintiff.

§ 5/2-1116.

69. *See* § 5/2-1116.

70. 689 N.E.2d 1057, 1057 (Ill. 1997).

71. 735 Ill. Comp. Stat. Ann. 5/2-1115.1 (2009).

72. *Id.* Amended section 2-1117(b) relied upon section 2-1115.1, so when the court ruled 2-1115.1 unconstitutional, it was only logical that 2-1117 must also be unconstitutional. *See* 735 ILL. COMP. STAT. ANN. 5/2-1117(b) (2009); *see also Best*, 689 N.E.2d at 1087.

73. *Best*, 689 N.E.2d at 1087.

74. *See* Tort Reform Act of 1995, Pub. Act No. 89-7 § 2-1117 (1995) (codified at 735 ILL. COMP. STAT. ANN. 5/2-1117 (1995)). Later Public Act 89-7 was held to be unconstitutional by *Best*, 689 N.E.2d at 1088.

75. *Best*, 689 N.E.2d at 1087. Public Act 89-7 also included amendments to section 2-1116. *See Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 732 (Ill. 2008).

several liability, also directly conflicted with the existing Workers Compensation Act,<sup>76</sup> which allowed joint and several liability.<sup>77</sup>

After 89-7 was held to be unconstitutional, the courts resorted to the original wording of 2-1117.<sup>78</sup> However, 89-7 continues to influence the courts' decisions, including the *Ready I* decision, where the plaintiff argued that the amendment to 2-1117, which included settling defendants in the apportionment of fault, "is a strong indication that the 1986 version . . . was not intended to include such defendants."<sup>79</sup> In between 89-7 and the *Ready I* decision, however, the courts still were undecided as to whether settled defendants should be included on jury verdict forms for purposes of apportioning fault.<sup>80</sup>

In 2000, the appellate court in *Lombardo v. Reliance Elevator Co.*<sup>81</sup> held that the trial court was correct when it included two of the settled defendants on the jury verdict form so that the jury could consider their alleged negligence when apportioning fault.<sup>82</sup> The appellate court stated that "inclusion of nonparties and settling defendants on the verdict form helps protect the plaintiff's right to an appropriate attribution of his own fault, as well as protecting the defendants' interests in their right to contribution."<sup>83</sup>

In *Unzicker v. Kraft Food Ingredients Corp.*,<sup>84</sup> the Illinois Supreme Court held that 2-1117 made it clear that minimally responsible defendants should not have to pay entire damages awards.<sup>85</sup> In this case, the jury found the defendant/employer to be ninety-nine percent responsible and the other defendant to be one percent responsible.<sup>86</sup> On appeal, the defendant/employer claimed the Worker's Compensation Act<sup>87</sup> provided immunity from liability in tort actions brought by its employees.<sup>88</sup> The Illinois

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76. Workers Compensation Act, 740 ILL. COMP. STAT. ANN. 100/4 (2009).

77. *See Best*, 689 N.E.2d at 1085.

78. *See, e.g., Ready*, 905 N.E.2d at 732; *Unzicker v. Kraft Food Ingrid. Corp.*, 783 N.E.2d 1024, 1029 n.1 (Ill. 2002).

79. *Ready*, 905 N.E.2d at 733.

80. *Compare Lombardo v. Reliance Elevator Co.*, 733 N.E.2d 874, 886 (Ill. App. Ct. 2000) (allowing settled defendants to be included on the jury verdict form), *with Yoder v. Ferguson*, 885 N.E.2d 1060, 1081 (Ill. App. Ct. 2008) (disallowing settled defendants from being included on the jury verdict form).

81. 733 N.E.2d 874, 874 (Ill. App. Ct. 2000).

82. *Id.* at 886.

83. *Id.* at 885.

84. 783 N.E.2d 1024, 1024 (Ill. 2002).

85. *Id.* at 1033.

86. *Id.* at 1029.

87. 820 ILL. COMP. STAT. ANN. 305/5(a) (West 2000) ("No common law or statutory right to recover damages from the employer . . . for injury or death sustained by any employee . . . other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act.").

88. *Unzicker*, 783 N.E.2d at 1032.

Supreme Court, however, disagreed with this theory, stating that the immunity provided by the Worker's Compensation Act must be raised as an affirmative defense, which the defendant/employer had failed to do.<sup>89</sup> The supreme court declared that the legislature intended to apportion fault to all responsible parties; ignoring the defendant who was ninety-nine percent responsible for plaintiff's injuries, while forcing the defendant who was one percent responsible to pay for all the damages, was clearly out of step with the intent of the legislature when they created 2-1117.<sup>90</sup>

The decision in *Unzicker* led to the 2003 amendment of 2-1117, which specifically prevented a plaintiff's employer from being considered when apportioning fault.<sup>91</sup> This was due to the confusion caused when trying to apply both 2-1117 and the Workers' Compensation Act.<sup>92</sup> As it stands now, the language contained in section 2-1117 limits apportionment of fault to three parties: the plaintiff, defendants sued by the plaintiff, and third-party defendants.<sup>93</sup> This does not include employers or non-parties.<sup>94</sup> The phrase "defendants sued by the plaintiff"<sup>95</sup> is ambiguous, however, as to whether this includes defendants who were sued by the plaintiff but subsequently settled, or if it only includes defendants who proceed to the point in trial where the jury apportions fault to the remaining parties.<sup>96</sup> This was the central issue presented to the Illinois Supreme Court in *Ready v. United/Goedecke Services, Inc.*<sup>97</sup>

### 1. *Facts of Ready v. United/Goedecke Services, Inc.*

Michael Ready was killed when a truss fell on him from eight floors above while working on a pipe-refitting project in Joliet, Illinois.<sup>98</sup> Ready's wife, in a wrongful death action, sued three defendants: Ready's employer—Midwest Generation, LLC (Midwest); the general contractor of the project—

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89. *Id.* (quoting *Doyle v. Rhodes*, 461 N.E.2d 382, 386-87 (Ill. 1984)).

89. Pub. Act 93-10 and 93-12 § 5 (2003) (codified at 735 ILL. COMP. STAT. ANN. 5/2-1117 (2003)).

90. *Unzicker*, 783 N.E.2d at 1033.

91. Pub. Act 93-10 and 93-12 § 5 (2003) (codified at 735 ILL. COMP. STAT. ANN. 5/2-1117 (2003)); *see also* *Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 729 n.2 (Ill. 2008) (limiting the allocation of fault to "the plaintiff, the defendants sued by the plaintiff, and any third party defendant except the plaintiff's employer").

92. *See, e.g.*, *Lilly v. Marcal Rope & Rigging, Inc.*, 682 N.E.2d 481, 481 (Ill. App. Ct. 1997); *Unzicker v. Kraft Food Ingrid. Corp.*, 783 N.E.2d 1024, 1033 (Ill. 2002).

93. 735 ILL. COMP. STAT. ANN. 5/2-1117 (2009); *See also* Elliot R. Schiff, *Apportioning Liability in Third-Party Cases: Recent Issues*, 93 ILL. B.J. 38, 40 (2005).

94. 735 ILL. COMP. STAT. ANN. 5/2 § 2/1117.

95. *Id.*

96. *Ready v. United/Goedecke Serv, Inc.*, 905 N.E.2d 725, 728 (Ill. 2008).

97. *Id.* at 725.

98. *Id.* at 727.

BMW Constructors, Inc. (BMW); and the sub-contractor who performed the scaffolding work—United/Goedecke Services, Inc (United).<sup>99</sup>

In good faith, Midwest and BMW settled with plaintiff before trial for \$1.113 million.<sup>100</sup> United did not object to the settlement and continued to trial alone.<sup>101</sup> Granting plaintiff's motion in limine,<sup>102</sup> the trial court did not allow United to offer any evidence of Midwest's or BMW's conduct in the accident,<sup>103</sup> and did not allow United to pursue a sole proximate cause defense.<sup>104</sup> The trial court, in interpreting 2-1117,<sup>105</sup> also did not include Midwest and BMW on the jury verdict form, which would have allowed the jury to accurately apportion fault among the three defendants and the plaintiff.<sup>106</sup>

The jury found in favor of plaintiff and awarded \$14.23 million in damages.<sup>107</sup> The jury, unaware of the two settled defendants' conduct in the matter, determined United to be sixty-five percent liable, which made it jointly and severally liable for the plaintiff's non-medical bills under 2-1117.<sup>108</sup> The award was offset by Ready's comparative negligence, determined to be thirty-five percent by the jury, and the \$1.113 million settlement with Midwest and BMW.<sup>109</sup> United was ultimately held liable for \$8.137 million.<sup>110</sup>

United appealed, arguing that the two settled defendants should have been included on the jury form so that United's liability might fall below twenty-five percent, which, according to 2-1117, would mean that United would only be severally liable as opposed to jointly and severally liable.<sup>111</sup>

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99. *Id.*

100. *Id.*

101. *Ready*, 905 N.E.2d at 727.

102. *Dowe v. Nat'l R.R. Pass. Corp.*, 2004 WL 887410 at \*2 (N.D. Ill., 2004) (stating that “[a] motion in limine is, generally speaking, an appropriate mechanism for determining the proper scope of evidence and argument at trial”).

103. *Ready*, 905 N.E.2d at 728. At the time of the trial court's ruling, the courts were still confused as to whether a defendant could present evidence of the conduct of settled defendants in pursuit of a sole proximate cause defense. *Id.* This would not be made clear until the Illinois Supreme Court's ruling in *Nolan v. WEIL-McLain*, 910 N.E.2d 549, 564 (Ill. 2009).

104. *Ready*, 905 N.E.2d at 728. On remand to determine whether the jury should have been instructed on sole proximate cause, *Ready v. United/Goedecke Serv., Inc.*, 911 N.E.2d 1140, 1140 (Ill. App. Ct. 2009), the appellate court reversed the Illinois Supreme Court's ruling, holding that the defendant could offer evidence of settled defendants. *Id.* at 1143. This was due to the recent ruling in *Nolan*. *Id.* at 1142.

105. 735 Ill. Comp. Stat. Ann. 5/2-1117 (2009).

106. *Ready*, 905 N.E.2d at 728.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 728 (Ill. 2008).

111. *Id.*

Agreeing with United, the appellate court reversed, holding that section 2-1117 allowed nonsettled defendants' fault to be assessed in relation to settled defendants, and that evidence relating to the liability of these settled defendants was relevant and admissible when pursuing a sole proximate cause defense.<sup>112</sup>

Ready's wife appealed, and after reviewing the case, the Illinois Supreme Court disagreed with the appellate court, holding that settled defendants were not "defendants sued by the plaintiff"<sup>113</sup> within the meaning of section 2-1117, and thus were not to be included on the jury verdict form when apportioning fault.<sup>114</sup> The supreme court affirmed the appellate court's upholding of the amount of damages but reversed the remainder of the appellate court's judgment.<sup>115</sup>

Four months later, the supreme court modified the *Ready I* decision on its denial of rehearing.<sup>116</sup> The supreme court remanded the case to the appellate court for a decision as to whether the jury should have received United's sole proximate cause instruction.<sup>117</sup> Presumably, this reversal took place because the court had already heard the *Nolan* arguments and decided the *Nolan* case in chambers but had yet to publish the decision, which it would not do until April 16, 2009.<sup>118</sup> The *Nolan* case held that in *any* tort action, a defendant *may* present evidence relating to the culpability of the settled defendants in pursuit of its sole proximate cause defense.<sup>119</sup>

On remand, the appellate court referred to the recent holding in *Nolan* as "instructive,"<sup>120</sup> and focused not on the trial court's exclusion of the instruction, but rather on United's ability to present evidence of Midwest and BMW in pursuit of its sole proximate cause defense.<sup>121</sup> The appellate court held that it was wrong for the circuit court to have excluded evidence of the conduct of Midwest and BMW.<sup>122</sup> The appellate court then remanded the

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112. *Id.*

113. 735 Ill. Comp. Stat. Ann. 5/2-1117 (2009).

114. *Ready*, 905 N.E.2d at 733-34.

115. *Id.* at 735. On remand to determine if United was deprived of a sole proximate cause instruction, the appellate court reversed the supreme court due to the more recent ruling in *Nolan*, which held that remaining defendants in any tort action could present evidence of settled defendants in support of their sole proximate cause defense. *Ready v. United/Goedecke Serv., Inc.*, 911 N.E.2d 1140, 1143 (Ill. App. Ct. 2009) (decided on June 30, 2009).

116. *Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725 (Ill. 2008), *modified on denial of reh'g*, (March 23, 2009).

117. *Id.* at 734.

118. *Nolan v. WEIL-McLain*, 910 N.E.2d 549, 549 (Ill. 2009).

119. *Id.* at 564.

120. *Ready v. United/Goedecke Serv., Inc.*, 911 N.E.2d 1140, 1142 (Ill. App. Ct. 2009) (decision published June 30, 2009.).

121. *Id.*

122. *Id.* at 1143.

case to the lower court for a new trial, instructing the lower court that “a determination regarding the [sole proximate cause] instruction given [to the jury] will depend upon the evidence adduced at retrial.”<sup>123</sup> The case never made it back to the trial court, however; Ready’s wife again appealed the decision to the Illinois Supreme Court.<sup>124</sup>

Upon agreeing to review the decision, the Illinois Supreme Court was left with the disagreeable task of turning hay into gold—it had to somehow synthesize its *Ready I* decision and the *Nolan* decision. That is, it had to explain how the court was able in one decision to say that a settled defendant cannot be listed on a jury verdict form for purposes of apportioning fault,<sup>125</sup> and then say in a subsequent decision that, in fact, they can.<sup>126</sup>

The *Ready II* decision that was published on October 21, 2010 turned out to be anti-climatic, and was more noteworthy not for what it said, but for what it did not say. The plurality opinion did not try to explain why the sole proximate cause defense should act as an exception or loop-hole to 2-1117, when: 1) 2-1117 does not once mention the sole proximate cause defense, and 2) in *Ready I*, the supreme court held that 2-1117 prevents settled defendants’ culpability from being assessed relative to the culpability of the remaining defendant.<sup>127</sup> Rather, the supreme court sidestepped that quagmire by holding that while the trial court committed error when it prevented United from submitting evidence of the settled defendants in support of its sole proximate cause defense, that error was harmless, and therefore did not warrant a new trial.<sup>128</sup> In this way, the supreme court confirmed its decision in *Nolan*, thus preserving the sole proximate cause defense indefinitely.

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123. *Id.* at 1144 (citing *Leonardi v. Loyola U. of Chi.*, 658 N.E.2d 450, 458-59 (Ill. 1995)).

124. *Ready v. United/Goedecke Serv., Inc.*, No. 108910, 2010 WL 4126244, at \*3 (Ill. Oct. 21, 2010).

125. *Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 733-34 (Ill. 2008), *modified on denial of reh’g*, (March 23, 2009).

126. *See Nolan v. WEIL-McLain*, 910 N.E.2d 549, 564 (Ill. 2009); *see* discussion *infra* Part III.B. By allowing a jury to hear evidence of the conduct of settled defendants, that evidence inevitably plays a part when the jury apportions fault, *see supra* note 11; thus, the settled defendants become “listed” on the jury verdict form.

127. *Ready*, 905 N.E.2d at 734. *But see Ready v. United/Goedecke Serv., Inc.*, No. 108910, 2010 WL 4126244, at \*7-8 (Ill. Oct. 21, 2010) (Garman, J. concurring) (concurring with the plurality opinion, but reiterating his dissent from the *Ready I* decision in which he deftly argues why 2-1117, in fact, includes settled defendants).

128. *Ready v. United/Goedecke Serv., Inc.*, No. 108910, 2010 WL 4126244, at \*5, \*7 (Ill. Oct. 21, 2010) (holding that because there was significant evidence that United was a proximate cause of the accident, a new jury in a new trial would undoubtedly reach the same verdict).



## B. THE SOLE PROXIMATE CAUSE DEFENSE

In Illinois, a defendant in a civil trial has the right to assert the defense of sole proximate cause and to offer evidence of settled defendants or non-parties in order to try to convince the judge to assign the sole proximate cause instruction to the fact finder.<sup>129</sup> The defendant that chooses to do so bears the burden of proving that the single proximate cause of the plaintiff's injuries was an independent event, settled defendant, or third party not named or no longer in the suit.<sup>130</sup> Although a defendant's use of the sole proximate cause defense may distract the jury from the defendant's own culpability, the defense does not negate the plaintiff's burden to prove the defendant's negligence was a proximate cause of the plaintiff's injuries; the plaintiff must still prove that the defendant owed the plaintiff a duty, the defendant breached that duty, the plaintiff suffered actual harm, and the defendant's breach was an actual and proximate cause of the plaintiff's injuries.<sup>131</sup>

Although the sole proximate cause defense and instruction have been available for use in Illinois since as early as 1901,<sup>132</sup> there is much controversy surrounding their usage for a variety of reasons.<sup>133</sup> One reason is that many dislike the defense because defendants are not required to submit an affirmative pleading or warning that they intend to use it,<sup>134</sup> so plaintiffs are oftentimes caught unaware with disastrous effects. A second reason many dislike the defense is that the plaintiff's burden of proof regarding causation becomes more cumbersome when the defendant uses the defense—the plaintiff is subsequently forced to disprove unknown causes or defend non-parties to the litigation in order to prove that the defendant is culpable.<sup>135</sup> Finally, there is the concern that instead of focusing on whether the defendant's conduct was a contributing factor, the jury will try to figure out what

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129. *Id.* at \*5; Nolan v. WEIL-McLain, 910 N.E.2d 549, 564 (Ill. 2009). See *supra* note 17 for the text of the sole proximate cause jury instruction.

130. Leonardi v. Loyola U. of Chi., 658 N.E.2d 450, 455 (Ill. 1995).

131. Dan B. Dobbs, Paul T. Hayden, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 108 (4th ed. West Publishing Co. 2001) (1985); see also Smith v. Eli Lilly & Co., 560 N.E.2d 324, 328 (Ill. 1990) (holding that mere conjecture or speculation of defendant's culpability is insufficient proof; a preponderance of evidence is still necessary).

132. See, e.g., Chi. & Alton R.R. Co. v. Harrington, 61 N.E. 622 (Ill. 1901).

133. See generally, John G. Phillips, *The Sole Proximate Cause "Defense": A Misfit in the World of Contribution and Comparative Negligence*, 22 S. ILL. U. L.J. 1, 5 (1997).

134. See Leonardi, 658 N.E.2d at 455. ("A general denial of any proximate cause is sufficient for the defendant to raise the defense." *Id.* at 459.).

135. Phillips, *supra* note 133, at 2.

the single cause of the injury might be and avoid the issue of defendant's proximate cause altogether.<sup>136</sup>

Some, however, consider the sole proximate cause defense to be a useful tool. In *Leonardi v. Loyola University of Chicago*,<sup>137</sup> for example, the court stated that the "sole proximate cause defense merely focuses the attention of a properly instructed jury . . . on the plaintiff's duty to prove that the defendant's conduct was a proximate cause of plaintiff's injury."<sup>138</sup> Consequently, the defense is still employed, although the instruction is not given to the jury as often as defendants would like.<sup>139</sup> *Leonardi* is again instructive—once the sole proximate cause defense is raised, "[i]f the evidence is sufficient, the defendant is entitled to an instruction on this theory."<sup>140</sup> *Ready II* helped define "sufficient": the sole proximate cause instruction "should be given where there is evidence, albeit slight and unpersuasive, tending to show that the sole proximate cause of the accident was the conduct of a party other than the defendant."<sup>141</sup>

In *Nolan v. WEIL-McLain*,<sup>142</sup> the Illinois Supreme Court found that the remaining defendant's evidence *was* sufficient for a sole proximate cause instruction and decided the case in such a way that was not only favorable to the remaining defendant, but favorable to all future defendants, no doubt shaping defense strategies for years to come.<sup>143</sup>

### *I. Facts of Nolan v. WEIL-McLain*

During a thirty-eight year career that spanned the 1950s, 60s, 70s, and 80s, Clarence Nolan installed, repaired, and removed boilers and boiler accessories manufactured by a number of different companies.<sup>144</sup> Common to this time period, these boiler accessories were largely made of asbestos.<sup>145</sup> While cutting asbestos rope, mixing and applying asbestos cement, and removing asbestos insulation from pipes in the course of a day's work,

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136. *Id.*

137. 658 N.E.2d 450, 450 (Ill. 1995).

138. *Id.* at 456.

139. *See, e.g., Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 734 (Ill. 2008).

140. *Leonardi*, 658 N.E.2d at 459.

141. *Ready v. United/Goedecke Serv., Inc.*, No. 108910, 2010 WL 4126244, at \*5 (Ill. Oct. 21, 2010).

142. 910 N.E.2d 549, 549 (Ill. 2009).

143. *Id.* at 564 (holding that a defendant in *any* tort action may submit evidence in support of the defendant's sole proximate cause defense, which will likely be utilized in the future by many defendants).

144. *Id.* at 550-52.

145. *Id.*

Nolan breathed in a large quantity of airborne asbestos particles.<sup>146</sup> From this inhalation, Nolan alleged he developed mesothelioma, a respiratory cancer previously linked to the inhalation of airborne asbestos particles.<sup>147</sup> In 2001, Nolan and his wife filed suit against twelve different companies whose asbestos-containing products Nolan had repeatedly worked with during his career.<sup>148</sup> During the course of the litigation, Nolan died of malignant mesothelioma.<sup>149</sup> His wife carried on the suit against the twelve defendants, a suit which had subsequently turned into a wrongful death action.<sup>150</sup>

Over time, eleven of the twelve defendants either settled with the plaintiff or were dismissed prior to trial.<sup>151</sup> The remaining defendant—WEIL-McLain—argued in a motion in limine that it should be able to present evidence that the sole proximate cause of decedent’s death was his exposure to asbestos-containing products of non-party entities, including the settled defendants.<sup>152</sup> The defendant argued that by prohibiting him from admitting evidence of non-parties’ or settled defendants’ conduct, the court was essentially prohibiting the jury from being allowed to consider and weigh all the relevant evidence on its own.<sup>153</sup> Consequently, the jury would be forced to speculate regarding the cause of the plaintiff’s injuries, since they were not allowed to hear all the relevant evidence.<sup>154</sup>

The circuit court ruled against the defendant’s motion in limine, although it prefaced its ruling by stating that, while there existed a “certain unfairness”<sup>155</sup> in not allowing the defendant to submit the evidence, they were bound by existing law.<sup>156</sup> The court rationalized preventing the defendant from admitting evidence of this kind because it might confuse the jury.<sup>157</sup> A confused jury may overlook the fact that, “one guilty of negligence cannot avoid responsibility merely because another person is guilty of negligence contributing to the same injury . . . [e]ither or both parties are

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146. *Id.* at 552.

147. *Nolan*, 910 N.E.2d at 553.

148. *Id.* at 550.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Nolan*, 910 N.E.2d at 550.

153. *See id.* at 555.

154. *See Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 455 (Ill. 1992).

155. *Nolan*, 910 N.E.2d at 551.

156. *Id.*

157. *See, e.g., id.; see also, Kochan v. Owens-Corning Fiberglass Corp.*, 610 N.E.2d 683, 689 (Ill. App. Ct. 1993).

liable for all damages sustained.”<sup>158</sup> Because of this possibility, courts have held that such evidence is not relevant.<sup>159</sup>

The jury rendered a verdict for plaintiff in the amount of \$2.3 million, which was offset by the \$1.2 million received in settlement.<sup>160</sup> Defendant filed a post-trial motion arguing that the circuit court erred in excluding all evidence of decedent’s other exposure to asbestos-containing products.<sup>161</sup> Although the court denied the motion, it noted that it did so reluctantly, and that the defendant should have been able to offer the evidence.<sup>162</sup> The court stated it was bound by stare decisis, but that it was conflicted between what the law *should* be and the current state of the law.<sup>163</sup>

The appellate court affirmed the lower court’s decision,<sup>164</sup> and the Illinois Supreme Court granted leave to appeal.<sup>165</sup> Defendant’s appeal presented the question as to whether the circuit court committed error by excluding all evidence of defendant’s exposure to asbestos throughout his thirty-eight year career from products other than those of defendant.<sup>166</sup> The Illinois Supreme Court ruled that its earlier case law had been misinterpreted and ruled that the remaining defendant should have been able to present evidence of the settled defendants’ and non-parties’ wrongdoing.<sup>167</sup> In relying on *Leonardi v. Loyola University of Chicago*,<sup>168</sup> the supreme court allayed this dilemma by holding that a defendant in *any* tort action<sup>169</sup> has the right to offer evidence of non-parties and settled parties in order to contest proximate cause.<sup>170</sup> According to *Nolan*, that evidence *is* relevant.<sup>171</sup>

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158. This is the “Lipke Exclusionary Rule.” *Lipke v. Celotex Corp.*, 505 N.E.2d 1213, 1221 (Ill. App. Ct. 1987).

159. *Id.*

160. *Nolan*, 910 N.E.2d at 554.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Nolan*, 910 N.E.2d at 555.

166. *Id.*

167. *See id.* at 564.

168. 658 N.E.2d 450, 450 (Ill. 1995). A medical malpractice case holding that evidence of non-parties and settled defendants may be admitted in support of defendant’s sole proximate cause defense. *Id.* at 459. Lower courts were unclear as to whether *Leonardi*’s holding extended to non-medical malpractice cases. *See, e.g., Nolan*, 910 N.E.2d at 551.

169. *Nolan*, 910 N.E.2d at 564.

170. *Id.* at 563.

171. *Id.*

### III. ANALYSIS

#### A. THE EXISTING LAW UNDER *READY I* AND *NOLAN* DOES NOT PROTECT MINIMALLY CULPABLE DEFENDANTS

In light of the *Nolan* and *Ready I* decisions, the existing law does not protect minimally culpable defendants; it only protects non-culpable defendants.<sup>172</sup> The legislature's intent in passing section 2-1117—to protect minimally culpable defendants<sup>173</sup>—has not been achieved.

Under the existing law, a defendant in any tort action may submit evidence of the conduct of settled defendants to prove that he is blameless, which is a sole proximate cause defense.<sup>174</sup> That same defendant, however, may not offer evidence of the conduct of settled defendants to prove that he is only one percent to blame for plaintiff's injuries.<sup>175</sup> In other words, Defendant A, who is in fact one percent to blame for plaintiff's injuries, cannot offer evidence of settled Defendant B, who is in fact ninety-nine percent to blame, even though this restriction might result in the jury apportioning one hundred percent of the blame to Defendant A.

The same divergence in protection exists under the laws regarding jury instructions—the court may give the jury a sole proximate cause instruction, which allows the jury to apportion one hundred percent of the fault to an *unnamed* entity in order to relieve the remaining defendant from paying any damages.<sup>176</sup> On the other hand, the court will not name settled defendants on the jury verdict form, which may very well result in the remaining defendant having to pay one hundred percent of the damages.<sup>177</sup> The result of the existing law is that the remaining defendant is given all or none of the remaining liability, minus plaintiff's comparative fault.<sup>178</sup> This lack of any sort of middle ground results in non-settling defendants being forced to pay out larger sums or plaintiffs left not completely whole.<sup>179</sup>

Minimally responsible defendants should not be forced to pay entire damage awards—this was the legislature's intent when they passed section

172. See discussion *infra* Part III.A.2.

173. *Unzicker v. Kraft Food Ingrid. Corp.*, 783 N.E.2d 1024, 1033 (Ill. 2002).

174. *Nolan*, 910 N.E.2d at 564.

175. *Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 734 (Ill. 2008).

176. See Illinois Pattern Jury Instructions, Civil, §§ 12.04, 12.05 (2009).

177. *Ready*, 905 N.E.2d at 733.

178. Compare 735 ILL. COMP. STAT. ANN. 5/2-1116 (2009) (comparative negligence statute), with 735 ILL. COMP. STAT. ANN. 5/2-1117 (2009) (joint and several liability statute).

179. See David B. Mueller & Jennifer L. Wolfe, *supra* note 31 (stating that if a jury decides that the remaining defendant is not wholly to blame, their only other alternative is to apportion some blame to the plaintiff, regardless of her actual culpability).

2-1117.<sup>180</sup> Requiring a one percent responsible defendant to pay for all of the damages while ignoring the ninety-nine percent responsible settled defendant is clearly against the legislature's intent.<sup>181</sup>

1. *Deep-Pocketed Defendants and Plaintiffs Will Suffer Under the Ready I Ruling*

Given the ruling in *Ready I*, deep-pocketed defendants will be forced to pay for the misconduct caused by other, more responsible parties.<sup>182</sup> A plaintiff will now be less likely to agree to a reasonable settlement with a deep-pocketed defendant, because by keeping them in the case until the verdict is handed down, the plaintiff is more likely to receive a larger payout.<sup>183</sup> *Skaggs v. Senior Services of Central Illinois, Inc.*<sup>184</sup> illustrates this flaw by pointing out that if settling defendants are not included in the apportionment of fault under 2-1117, a plaintiff who sues two defendants may take advantage of 2-1117 by settling with the indigent defendant who is primarily at fault, and taking the wealthy defendant to trial.<sup>185</sup> In this manner the plaintiff will exploit the wealthy defendant, causing him to become jointly liable for the full amount of plaintiff's damages, because the settled defendant's portion of fault can no longer be considered.<sup>186</sup> Moreover, a minimally culpable defendant, who insists on a trial to let the jury equitably apportion fault, will now likely be held liable for the entire amount of the judgment due to the court's refusal to allow the jury to assign fault to all culpable parties.<sup>187</sup>

Under the strain of having to pay large damages awards, defendants will pass along these costs to others by way of raising consumer costs, which will in turn create economic inefficiency.<sup>188</sup> The legislature did not intend this result when it created 2-1117.<sup>189</sup> Quite the contrary—the Illinois General Assembly believed morality dictated that defendants should not

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180. *Unzicker v. Kraft Food Ingrid. Corp.*, 783 N.E.2d 1024, 1033 (Ill. 2002).

181. *See Ready v. United/Goeddecke Serv., Inc.*, No. 108910, 2010 WL 4126244, at \*7-8 (Ill. Oct. 21, 2010) (Garman, J. concurring); *see also Ready*, 905 N.E.2d at 746 (Garman, J. dissenting) (stating that “imposing excessive liability on a minimally responsible defendant . . . is not consistent with the public policy of this state as expressed by the legislature.”).

182. *See Ready*, 2010 WL 4126244 at \*8 (Garman, J. concurring); *see also Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1086 (Ill. 1997).

183. *Ready*, 2010 WL 4126244 at \*8 (Garman, J. concurring); *Ready*, 905 N.E.2d at 746 (Garman, J. dissenting).

184. 823 N.E.2d 1021, 1021 (Ill. App. Ct. 2005).

185. *Id.* at 1027-28.

186. *Id.*

187. *Ready*, 905 N.E.2d at 746 (Garman, J., dissenting).

188. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1086 (Ill. 1997).

189. *See Unzicker v. Kraft Food Ingrid. Corp.*, 783 N.E.2d 1024, 1033 (Ill. 2002).

have to pay for injuries they did not inflict.<sup>190</sup> “Although it may seem unjust to leave a plaintiff uncompensated for the entire loss, it may be equally unfair to require a defendant who caused a small portion of those damages to pay them in their entirety.”<sup>191</sup>

On the other hand, if a plaintiff settles out of court with the more culpable defendants and goes to trial with the minimally culpable, deep-pocketed defendant, it is quite possible that the plaintiff will be forced to bear a larger amount of the liability, when in fact, she was minimally culpable herself.<sup>192</sup> If, however, the fault is able to be apportioned among all of the defendants, including those that settled, the plaintiff is more likely to be made whole because her own share of the responsibility will be reduced.<sup>193</sup> As the appellate court in *Lombardo v. Reliance Elevator Co.*<sup>194</sup> aptly stated, “Accordingly, inclusion of nonparties and settling defendants on the verdict form helps protect the plaintiff’s right to an appropriate attribution of his own fault . . . .”<sup>195</sup>

In *Bofman v. Material Service Corp.*,<sup>196</sup> the appellate court reversed a judgment that held plaintiffs to be eighty-two percent responsible for the negligence that caused their injuries.<sup>197</sup> In considering the facts of the case, the court determined that the jury had either failed to consider the fault of settled parties or had attributed the fault of the settled parties to the plaintiff.<sup>198</sup> In its opinion, the court stated, “Consideration of the negligence of both parties and non-parties to an action is essential for determining liability commensurate with degree of total fault.”<sup>199</sup> The court then went on to explain that the purpose for considering the liability of settled tortfeasors is

190. *Best*, 689 N.E.2d at 1086 n.7 (quoting M. Redish, *The Constitutionality of Illinois Tort Reform III—The Repeal of Joint and Several Liability*, IDC QUARTERLY 5, 10 (1996)).

191. *Id.* (quoting Stephen J. O’Neil, *A New Day: The Civil Justice Reform Amendments of 1995*, 9 CHIC. BAR. ASSOC. REC. 18, 20 (1995); see also *Ready*, 905 N.E.2d at 746 (Garman, J. dissenting) (stating that “imposing excessive liability on a minimally responsible defendant . . . is not consistent with the public policy of this state as expressed by the legislature.”).

192. See *Lombardo v. Reliance Elevator Co.*, 733 N.E.2d 874, 885 (Ill. App. Ct. 2000).

193. *Ready v. United/Goedecke Serv., Inc.*, No. 108910, 2010 WL 4126244, at \*8 (Ill. Oct. 21, 2010) (Garman, J. concurring); *Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 746 (Ill. 2008) (Garman, J., dissenting).

194. 733 N.E.2d 874 (Ill. App. Ct. 2000).

195. *Id.* at 885.

196. 466 N.E.2d 1064 (Ill. App. Ct. 1984).

197. *Id.* at 1070.

198. *Id.*

199. *Id.* at 1072.

to properly determine the share of plaintiff's responsibility, not to necessarily limit the defendant's share.<sup>200</sup>

2. *Excluding Settled Defendants from the Jury Verdict Form when Apportioning Fault Violates the Remaining Defendants' Rights*

The equal protection rights provided by the Illinois government and the Federal Government are identical,<sup>201</sup> and require the government to treat similarly situated persons in a similar manner.<sup>202</sup> This protection prohibits the State from unequally treating people placed into different classes by a statute for reasons unrelated to the original intent of the statute.<sup>203</sup> Constitutional violations of equal protection may arise in the form of judicial decisions,<sup>204</sup> as seen here in the *Ready I* decision.

The *Ready I* decision violates minimally culpable defendants' equal protection rights, because the court took away the full protection of 2-1117 when it excluded settled defendants from the jury verdict form.<sup>205</sup> In the context of *Ready I*, where the persons being treated unequally are minimally culpable defendants, there is no fundamental right or suspect class involved; therefore, the scrutiny employed by the courts is mere rationality—the decision must have a rational relationship to a legitimate state interest and be neither arbitrary nor discriminatory.<sup>206</sup> *Unzicker v. Kraft Food Ingredients Corp.*<sup>207</sup> made clear the original state interest of 2-1117—minimally culpable defendants should not be responsible for the entire amount of damages.<sup>208</sup>

Together, the ruling in *Ready I* and the subsequent ruling in *Nolan* created two classes of similarly situated defendants—minimally culpable defendants who *are not* allowed to have their culpability compared to settled defendants and non-parties,<sup>209</sup> and minimally culpable defendants who *are* allowed to have their culpability compared to settled defendants, non-

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200. *Id.*

201. Compare U.S. CONST. amend. XIV, § 1 (containing the Equal Protection Clause), with ILL. CONST. art. I, § 2 (containing the equal protection clause). See also *People v. Donoho*, 788 N.E.2d 707, 718 (Ill. 2003).

202. *People v. Reed*, 591 N.E.2d 455, 457 (Ill. 1992).

203. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

204. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972).

205. *Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 733 (Ill. 2008).

206. *Fitzgerald v. Racing Ass'n*, 539 U.S. 103, 107 (2003).

207. *Unzicker v. Kraft Food Ingrid. Corp.*, 783 N.E.2d 1024 (Ill. 2002).

208. *Id.* at 1033.

209. *Ready*, 905 N.E.2d at 733.



parties, acts of nature, etc., while alleging a sole proximate cause defense.<sup>210</sup> Both classes of minimally culpable defendants ought to be fully protected by 2-1117,<sup>211</sup> keeping minimally culpable defendants severally liable only.<sup>212</sup> As it stands now, however, only a minimally culpable defendant alleging no fault is allowed to have the jury consider the fault of settled defendants and non-parties.<sup>213</sup> Consider the following hypothetical:

In the first scenario, the remaining defendant is minimally culpable for the plaintiff's injuries. After the plaintiff rests, the remaining defendant begins by telling the jury that he played only a small role in the circumstances surrounding the plaintiff's injuries, and offers evidence of his own conduct to support this claim. As the remaining defendant attempts to tell the jury about the more culpable settled defendants' involvement in the accident, however, and to offer evidence of their conduct in order to prove his own minimal culpability, the plaintiff objects. The judge rules that evidence of settled defendants is not allowed because the remaining defendant is not presenting a sole proximate cause defense; he is only arguing that he is minimally culpable.<sup>214</sup> Consequently, since the jury has only been exposed to evidence relating to the remaining defendant's conduct and the plaintiff's conduct, and since the jury is not aware of any other defendants because none are listed on the jury verdict form, the jury's allocation of fault will not be accurate, and will result in either the defendant or the plaintiff receiving a disproportionate percentage of the fault.

In the second scenario, the remaining defendant is minimally culpable for plaintiff's damages. After the plaintiff rests, the remaining defendant begins by denying his own culpability. He builds his case on the theory that the settled defendants' involvement in the accident warrants full liability for the plaintiff's injuries and offers evidence of their conduct, which the judge must now allow according to the new law.<sup>215</sup> In fact, most of the remaining defendant's defense centers on the conduct of the settled defendants, and how they, and not he, are to blame for the accident. This is the sole proximate cause defense.<sup>216</sup>

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210. *Nolan v. WEIL-McLain*, 910 N.E.2d 549, 563 (Ill. 2009). It is important to note that both defendant WEIL-McLain and defendant United/Goedecke pursued sole proximate defenses. *See Nolan*, 910 N.E.2d at 551; *Ready*, 905 N.E.2d at 734.

211. *See* 735 ILL. COMP. STAT. 5/2-1117 (2009).

212. *See Unzicker*, 783 N.E.2d at 1033.

213. *See Nolan*, 910 N.E.2d at 564.

214. *See Holton v. Mem. Hosp.*, 679 N.E.2d 1202, 1219 (Ill. 1997) (stating that in order to receive the sole proximate cause instruction, the defendant must present evidence that it was *only* the negligence of other persons that caused the plaintiff's injuries).

215. *See Nolan*, 910 N.E.2d at 564.

216. *See Leonardi v. Loyola U. of Chic.*, 658 N.E.2d 450, 455 (Ill. 1995) (stating that the "defense seeks to defeat a plaintiff's claim of negligence by establishing proximate cause in the act of solely another not named in the suit").

According to the *Ready I* decision, when the case is handed to the jury, the settled defendants cannot be listed on the jury verdict form for fault apportionment purposes.<sup>217</sup> The Illinois Supreme Court has shut the front door on this issue.<sup>218</sup> In light of the *Nolan* ruling,<sup>219</sup> however, the back door has been left open because by this point in the trial, the jury has already heard and been affected by the evidence regarding the conduct of the settled defendants. Even if the judge chooses not to give the sole proximate instruction to the jury, the jury will undoubtedly take into consideration the evidence of the settled defendants as the jury apportions fault, regardless of whether the settled defendant's names appear on the jury verdict form.<sup>220</sup> So, in effect, the settled defendants become "listed" on the jury verdict form, thus rendering unequal protection to similarly situated, minimally culpable defendants, which goes against both the U.S. and Illinois Constitutions.<sup>221</sup>

B. THE EXISTING LAW UNDER *READY I* AND *NOLAN* IS UNWORKABLE IN PRACTICE

The combination of the *Nolan* and *Ready I* rules is unworkable in practice. As it stands now, a remaining defendant is allowed to offer evidence of settled defendants in order to prove her sole proximate cause defense,<sup>222</sup> but is not allowed to include those remaining defendants on the jury verdict form for the jury to apportion fault.<sup>223</sup> Notwithstanding the rationale for the two decisions, the reality is that even if the jury verdict form does not include the settling defendants, and even if the jury chooses not to exercise the sole proximate cause instruction,<sup>224</sup> the jury has still heard evidence of the settled defendants' culpability and will apportion fault between the remaining defendant(s) and the plaintiff(s) accordingly.

A defendant is not required to plead sole proximate cause as an affirmative defense.<sup>225</sup> The defendant need only generally deny any proximate cause.<sup>226</sup> At that point, the defendant may submit competent evidence to establish that the conduct of "a third person, or some other causative factor,

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217. See *Ready v. United/Goedecke Serv., Inc.*, 905 N.E.2d 725, 734 (Ill. 2008).

218. *Id.*

219. *Nolan*, 910 N.E.2d at 564.

220. See *supra* note 11.

221. See U.S CONST. amend. XIV, § 1; ILL. CONST. art. I, § 2.

222. *Ready v. United/Goedecke Serv., Inc.*, No. 108910, 2010 WL 4126244, at \*5, \*7 (Ill. Oct. 21, 2010); *Nolan*, 910 N.E.2d at 564.

223. *Ready*, 905 N.E.2d at 734.

224. See Illinois Pattern Jury Instructions, Civil, §§ 12.04, 12.05 (2009).

225. *Leonardi v. Loyola Univ. of Chi.*, 658 N.E.2d 450, 459 (Ill. 1995).

226. *Id.*

is the sole proximate cause of plaintiff's injuries."<sup>227</sup> This includes defendants who have settled.<sup>228</sup>

Based on all the evidence adduced at trial, the court makes the decision to give the jury the sole proximate cause instruction.<sup>229</sup> All that is required for the court to extend the instruction to the jury is some evidence in the record, "albeit slight and unpersuasive, tending to show that the sole proximate cause of the accident was the conduct of a party other than the defendant."<sup>230</sup> Moreover, the judge does not even decide whether to give the instruction until the case is ready to be handed over to the jury.<sup>231</sup> This suggests that even if the judge *refuses* to give the sole proximate cause instruction to the jury, the jury will already have heard the evidence of the conduct of the settled defendants.<sup>232</sup> Even if the settled defendants are not listed on the jury verdict form, the jury is not likely to forget the evidence of the conduct of the settled defendants, and will undoubtedly take that evidence into consideration when apportioning percentages of fault.<sup>233</sup>

Also, consider the ramifications of the *Ready I* decision in a case in which the remaining defendant does not allege a sole proximate defense. The *Ready I* decision also presents a dilemma because the law, as it stands now in light of the *Ready I* ruling, will only function as intended by the Illinois Supreme Court if the defendant settles before the trial begins.<sup>234</sup> If a defendant decides to settle with plaintiff in good faith during the trial, or even while the jury is deliberating, this will cause the supreme court's ruling in *Ready I* to be unworkable, and will likely result in a mistrial.<sup>235</sup>

*Henry v. St. John's Hospital*<sup>236</sup> is a fine example of what can happen to a minimally culpable defendant when the more culpable defendant settles with the plaintiff after trial begins. In *Henry*, the trial ended and liability was apportioned between two groups of defendants—group one was apportioned ninety-three percent of the \$8.5 million award (\$7.9 million); group two was apportioned seven percent of the award (\$600, 000).<sup>237</sup> While the appeal was pending, however, group one settled with the plaintiff for \$3.35

227. *Id.*

228. *Nolan v. WEIL-McLain*, 910 N.E.2d 549, 564 (Ill. 2009).

229. *See Ready v. United/Goedecke Serv., Inc.*, 911 N.E.2d 1140, 1144 (Ill. App. Ct. 2009) (citing *Leonardi*, 658 N.E.2d at 458 ("A litigant has the right to have the jury clearly and fairly instructed upon each theory which was supported by the evidence.")).

230. *Ready v. United/Goedecke Serv., Inc.*, No. 108910, 2010 WL 4126244 at \*5 (Ill. Oct. 21, 2010).

231. *Ready*, 911 N.E.2d at 1144.

232. *See id.*

233. *See supra* note 11.

234. *See Ready*, 905 N.E.2d at 747 (Garman, J., dissenting).

235. *Id.*

236. 563 N.E.2d 410 (Ill. 1990).

237. *Id.* at 412.

million, which caused the second group of defendants to be responsible for the remaining \$5.15 million.<sup>238</sup>

Although this example took place during the appellate process and not directly before trial or during trial, the principle remains the same.<sup>239</sup> Here, the first group of defendants settled, leaving the second group of defendants, which the jury deemed to be only seven percent responsible, to then bear sixty-one percent of the damages award.<sup>240</sup> Had the first group of defendants settled halfway through the trial, or even as the jury deliberated in the back room, the same result would likely have been reached.

#### IV. THE EXISTING LAW MUST BE REVISED

Every trial should be an attempt to ascertain the truth of the matter.<sup>241</sup> This is an impossible task if evidence is omitted from the trial and the jury is kept from being made aware of all the culpable parties in the litigation. It is also not in the spirit of truth to allow all or most of the blame to fall squarely on the shoulders of a minimally culpable defendant. The law as interpreted by the *Ready I* and *Nolan* decisions must be revised to allow for an honest inquiry into the circumstances surrounding the plaintiff's injuries and to allow for a legitimate apportionment of fault.

##### A. THE *READY I* RULING SHOULD BE REVERSED

##### 1. *Settled Defendants Should Be Included on the Jury Verdict Form in Order to Conform with Other Legislative Policies*

Illinois has adopted a statute codifying modified comparative negligence.<sup>242</sup> By enacting this statute, the legislature envisioned a system that would apportion fault based on the relative fault of all parties to an action.<sup>243</sup> Subsequent judicial decisions have made it clear that the apportionment of fault in this type of system would extend to all tortfeasors in an action.<sup>244</sup> As the appellate court in *Bofman v. Material Services*<sup>245</sup> succinctly stated, "Consideration of the negligence of both parties and nonpar-

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238. *Id.* at 412-13.

239. *See id.*

240. *See id.* at 413 (calculating that \$5.15 million is sixty-one percent of \$8.5 million).

241. *Sears v. Rutishauser*, 466 N.E.2d 210, 214 (Ill. 1984).

242. 735 ILL. COMP. STAT. ANN. 5/2-1116 (2009); *Alvis v. Ribar*, 421 N.E.2d 886, 886 (Ill. 1981).

243. *See Chu v. Bowers*, 656 N.E.2d 436, 439 (Ill. App. Ct. 1995).

244. *E.g.*, *Parsons v. Carbondale Twp.*, 577 N.E.2d 779, 787 (Ill. App. Ct. 1991); *Bofman v. Material Serv. Corp.*, 466 N.E.2d 1064, 1072 (Ill. App. 1984).

245. 466 N.E.2d 1064 (Ill. App. 1984).

ties to an action is essential for determining liability commensurate with degree of total fault.”<sup>246</sup>

The Illinois Joint Tortfeasor Contribution Act<sup>247</sup> also allows parties the right to apportion fault to all tortfeasors, including the settled defendants.<sup>248</sup> A contribution action is simply a comparative negligence case, and determination of fault therein should be treated no differently than the determination of fault in the main action.<sup>249</sup> The wording of the Contribution Act itself makes clear the notion that settled defendants are to be included in the apportionment of damages: “[W]here 2 or more persons are subject to liability in tort arising out of the same injury . . . there is a right of contribution among them, *even though judgment has not been entered against any or all of them.*”<sup>250</sup> A settled defendant’s inclusion on the jury verdict form is essential to a just resolution of third-party disputes.<sup>251</sup> Common liability is a percentage that must equal one hundred, and the remaining defendant’s pro rata share cannot be fairly assessed without reference to the settled defendant’s pro rata share.<sup>252</sup>

Likewise, the *Ready I* decision must be reversed to include settled defendants on the jury verdict form, so that the jury may realistically apportion fault among all culpable parties and be in compliance with the Illinois’ policy of modified comparative fault and the Contribution Act.<sup>253</sup> Accordingly, a defendant’s rights under 2-1117 should not be denied because another defendant settles or is dismissed from the case.<sup>254</sup> Instead, defendants should be able to have their relative culpability compared to settled defendants and non-parties, and if the remaining defendant’s culpability falls below twenty-five percent, then he should be severally liable only.<sup>255</sup> In this way, fault will be apportioned appropriately, and minimally culpable defendants will be forced to pay only for those damages commensurate with their actual fault.<sup>256</sup>

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246. *Bofman*, 466 N.E.2d at 1072.

247. 740 ILL. COMP. STAT. 100/0.01-5 (2009).

248. *Truszewski v. Outboard Marine Motor Corp.*, 685 N.E.2d 992, 996-97 (Ill. App. Ct. 1997).

249. Brief of Defendant-Appellee, *Ready v. United/Goedecke Serv., Inc.*, *supra* note 59, at \*26.

250. 740 ILL. COMP. STAT. ANN. 100/2/(a) (2009) (emphasis added).

251. *Truszewski*, 685 N.E.2d at 996-97.

252. *See id.*

253. *Contra* William R. Tapella II, *Comparative Fault, Contribution, and Joint and Several Liability: An Argument Against Reconciliation*, 88 ILL. B.J. 694, 694 (2000).

254. *Alvarez v. Fred Hintz Constr.*, 617 N.E.2d 821, 826 (Ill. App. Ct. 1993).

255. Eileen M. Walsh & Eugene G. Doherty, *Section 2-1117: Several Liability’s Effect on Settlement and Contribution*, 79 ILL. B.J. 122, 125 (1991).

256. *See Banovz v. Rantanen*, 649 N.E.2d 977, 985 (Ill. App. Ct. 1995); *Bofman v. Material Serv. Corp.* 466 N.E.2d 1064, 1064 (Ill. App. Ct. 1984).

Moreover, 2-1117 is impotent if it does not include settled defendants; 2-1117 was created so that the harsh effects of joint and several liability would be softened for the remaining minimally culpable defendants.<sup>257</sup> If settlements were allowed to keep defendants from being considered when apportioning fault, then minimally responsible defendants would rarely, if ever, receive protection from 2-1117.<sup>258</sup> *Unzicker* proves this point—if the employer had been allowed to settle, evidence of its ninety-nine percent culpability would have been kept from the jury, and the remaining defendant and plaintiff would have been left holding that large portion of fault.<sup>259</sup>

## 2. *Settled Defendants Should Not Be Responsible for Additional Contribution*

Settled defendants, who are included on jury verdict forms for purposes of apportioning fault, should not be liable for the percentage of damages they are assigned. Including settled defendants on the jury verdict form will not affect the Contribution Act,<sup>260</sup> which provides that a defendant who settles is discharged from all liability for contribution to any defendant who is still liable.<sup>261</sup> A jury's inclusion of the settled defendant's pro rata share of liability will only facilitate the jury's equitable assessment of the remaining defendant's share of liability.<sup>262</sup>

On the other hand, dismissing settling defendants should not affect the remaining defendants' or plaintiffs' ability to obtain the testimony of the settling parties' personnel, nor will a settlement keep a settled defendant's witnesses out of the trial.<sup>263</sup> The district court clearly held this opinion by stating, "The dismissal of any settling defendants will leave the plaintiffs and the remaining defendants and third party defendants . . . completely unhindered in presenting evidence and arguments regarding the relative responsibility of all concerned."<sup>264</sup>

## B. THE SOLE PROXIMATE CAUSE INSTRUCTION SHOULD BE ABOLISHED

The sole proximate cause instruction should be abandoned because its entire premise is based on a fallacy: an event rarely has only one cause for

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257. *Unzicker v. Kraft Food Ingred. Corp.*, 783 N.E.2d 1024, 1033 (Ill. 2002).

258. *See id.*

259. *See Unzicker*, 783 N.E.2d at 1024.

260. 740 ILL. COMP. STAT. 100/0.01-5 (2009).

261. 740 ILL. COMP. STAT. 100/2(d) (2009).

262. *See Truszewski*, 685 N.E.2d at 996.

263. *Dowe v. Nat'l R.R. Pass. Corp.*, No. 01 C 5808, 2004 WL 887410, at \*9 n.2 (N.D. Ill., Apr. 26, 2004).

264. *Id.*

its occurrence, as the instruction's name suggests.<sup>265</sup> In fact, modern wisdom tells us that any event rarely has only one causal antecedent; usually the causes are numerous.<sup>266</sup> Tort law also adheres to the principle that there may be more than one causal factor of an injury.<sup>267</sup> And yet, the courts are still instructing juries to try to find a sole cause of the plaintiff's injuries.<sup>268</sup> This is a confusing instruction that shifts the focus of juries from whether defendant was a proximate cause of the plaintiff's injuries to whether a sole proximate cause exists that the jury can point to that accounts for the entirety of the plaintiff's injuries.<sup>269</sup> This attempt to point to a solitary figure as the sole cause for the plaintiff's injuries is simply unnecessary, because a jury need only decide whether the plaintiff's injuries were a natural and probable result of the defendant's breach of duty.<sup>270</sup> If the defendant's actions were not at all responsible for the plaintiff's injuries, then the jury should assign zero culpability to that defendant. This method would allow the jury to "simply say that the defendant's act or omission was not the proximate cause of the plaintiff's injury and leave it at that."<sup>271</sup>

Eliminating the sole proximate cause instruction does not mean defendants would no longer be able to defend themselves; eliminating this would mean only that the confusing instruction would no longer be given to juries.<sup>272</sup> Any and all defendants will still be able to claim that they were not a proximate cause of the plaintiff's injuries and that someone or something else was.<sup>273</sup> Moreover, any defendant should still be able to submit evidence of settled parties as *Nolan* dictated, despite the fact that the sole proximate cause instruction no longer exists. It is only through an inclusion of this evidence that the jury can fully understand the events that led to the plaintiff's injuries and make a proper distribution of fault.

## V. CONCLUSION

The role that defendants continue to play in the litigation after they settle has been an issue of controversy in Illinois courts for quite some time. In its 2008-2009 term, however, the Illinois Supreme Court decided two cases—*Ready v. United/Goedecke Services, Inc.*<sup>274</sup> and *Nolan v. WEIL-*

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265. Phillips, *supra* note 133, at 5-6.

266. Fowler V. Harper, THE LAW OF TORTS § 20.2 (2d ed. 1986).

267. See, e.g., Bentley v. Saunemin Twp., 413 N.E.2d 1242, 1245 (Ill. 1980).

268. See Illinois Pattern Jury Instructions, Civil, §§ 12.04, 12.05 (2009); see also Phillips, *supra* note 133, at 2.

269. Phillips, *supra* note 133, at 2.

270. Stojkovich v. Monadnock Bldg., 666 N.E.2d 704, 708 (Ill. App. Ct. 1996).

271. Phillips, *supra* note 133, at 7.

272. *Id.* at 9.

273. *Id.*

274. 905 N.E.2d 725, 725 (Ill. 2008).

*McLain*<sup>275</sup>—that were supposed to clear up the controversy. Instead, the combination of the two cases create additional layers of confusion and inequality in the manner in which fault is distributed among remaining defendants and plaintiffs.

It is imperative, therefore, that revisions be made to existing tort law to provide an equitable playing field for plaintiffs and defendants. First, the *Ready I* decision should be reversed to allow settled defendants on the jury verdict form so that a realistic and appropriate distribution of fault may be reached. Second, the sole proximate cause instruction<sup>276</sup> should be abolished from Illinois courts as it is both fallacious in nature and confusing to jury members trying to determine the question of proximate cause. It is only through these changes that remaining defendants and plaintiffs will receive a portion of fault that is commensurate with their actual culpability.

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275. 910 N.E.2d 549, 549 (Ill. 2009).

276. Illinois Pattern Jury Instructions, Civil, §§ 12.04, 12.05 (2009).

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