

Special Bulletin

by Maureen A. Coleman

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ILLINOIS SUPREME COURT ALLOWS EVIDENCE OF SETTLED AND DISMISSED PARTIES' FAULT TO PROVE SOLE PROXIMATE CAUSE IN ASBESTOS CASE

The defendant in an asbestos case has the right to introduce evidence showing that the plaintiff's exposures to non-parties' asbestos-containing products were the sole proximate cause of plaintiff's injuries. *Nolan v. Weil-McLain*, Docket No. 103137, April 16, 2009. This decision also makes it clear that even though a settled defendant cannot be included on the verdict form for purposes of establishing joint and several liability, under the recent Supreme Court decision in *Ready* (see below), evidence of a settled defendant's fault can be introduced to show that a settled defendant was the sole proximate cause of the accident.

In *Nolan*, the plaintiff filed a complaint against twelve defendants alleging that the plaintiff's decedent developed mesothelioma after being negligently exposed to the defendants' asbestos-containing products. Eleven of the defendants settled or were dismissed prior to trial leaving Weil-McLain as the sole defendant. This defendant attempted to present evidence that the sole proximate cause of the plaintiff's death was his exposure to asbestos-containing products made by entities who were no longer parties at trial. The trial court reluctantly barred the remaining defendant from introducing evidence of decedent's other asbestos exposures.

In *Nolan*, the Illinois Supreme Court makes it explicitly clear that the plaintiff in an asbestos case has the same burden to prove proximate cause as a plaintiff in any other tort matter. The *Nolan* Court held that various Illinois appellate courts had erroneously concluded that the Supreme Court's prior decision in *Thacker v. UNR Industries, Inc.*, 151 Ill.2d 343 (1992), stood for the proposition that once the plaintiff meets the frequency, regularity and proximity test, he or she thereby establishes legal causation thereby barring evidence of other exposure. The Illinois Supreme Court stated that *Thacker* provides a means for determining whether a plaintiff in an asbestos case has presented sufficient evidence to establish cause in fact, and thereby shift the burden of

production to the defendant. The ultimate burden of proof on the element of causation remains exclusively on the plaintiff. **The court reaffirmed that *Thacker* created no presumption on the issue of causation.**

The *Nolan* Court also addressed the "exclusionary rule" set forth in *Lipke v. Celotex Corp.*, 153 Ill. App.3d 498, 509 (1987). The Court held that when read correctly, *Lipke* simply held that if a defendant's negligence proximately caused the plaintiff's harm, evidence that another's negligence might also have been a proximate cause is irrelevant and properly excluded if introduced for the purpose of shifting liability to a concurrent tortfeasor. In the *Nolan* case, **where the defendant sought to offer evidence of decedent's other exposure to contest causation through the use of the sole proximate cause defense, which was not raised by the *Lipke* defendant, evidence of plaintiff's other exposures to asbestos-containing products was admissible.**

Recently in *Ready v. United-Goeddecke Services, Inc.*, modified without rehearing, Docket No. 103474 (March 23, 2009), the Illinois Supreme Court ruled that settling defendants are not to be included on the verdict form to assess their percentage of fault for joint and several liability purposes. **Where a defendant is pursuing a sole proximate cause defense, however, evidence to support that defense would be admissible and jurors would receive a sole proximate cause instruction.** That instruction should state that if the jury

found non-party entities were the only causes of plaintiff's injuries, the verdict should be for the defendant. Under *Ready*, however, settled defendants cannot be listed on the verdict form to assign them a specific percentage of fault.

Practical Considerations

Defendants in asbestos cases should plead of an affirmative defense of sole proximate cause. This will best preserve the non-settling defendant's argument at trial that evidence of other parties' fault is admissible to establish the other parties were the sole cause of the injuries. Notwithstanding this affirmative defense, the burden of proof of causation remains with the plaintiff. With the Illinois Supreme Court's clarification regarding the viability of the sole proximate cause defense and the admissibility of evidence of plaintiff's exposure to other asbestos-containing products to support that defense, the Court has leveled the playing field in asbestos cases and confirmed the admissibility of evidence of non-parties' fault in all personal injury cases. Whether parties missing at trial for reasons other than settlement or a favorable ruling on the merits can be included on the verdict form is still open for debate. Absent parties include those protected by an automatic bankruptcy stay, companies that have gone out of business, "phantom" parties who could not be identified, parties who never appeared, and parties dismissed on procedural or technical defenses such as statute of limitations.

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