

The Appellate Strategist

INSIGHTS ON APPELLATE ISSUES, TRIAL CONSULTATIONS, AND EVALUATING APPEALS

[Illinois Supreme Court: Settled Defendants Can Be Relevant to Sole Proximate Cause Defense](#)

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In Illinois, as in many states, a defendant can't include settled defendants on the verdict form, seeking an apportionment of fault.

So is there a way to make a settled defendant's conduct admissible?

Last week, the Illinois Supreme Court answered "yes."

[Ready v. United/Goedecke Services](#) arose from the death of a construction worker in an accident at a power plant. The decedent's administrator sued the general contractor and the scaffolding subcontractor, and the defendants cross-claimed against the decedent's employer. The administrator settled with the general contractor and the employer, and went to trial against the subcontractor.

The subcontractor alleged as an affirmative defense that the accident was caused in whole or in part by others.

Plaintiff moved *in limine* to keep out all evidence of the settling defendants' conduct. The Appellate Court held that a defendant's fault should be assessed under 735 ILCS 5/2-1117 compared to all other defendants, including settled defendants, so evidence of their conduct was relevant and admissible. In 2008, [the Supreme Court reversed](#), holding that settling defendants could not be apportioned liability under 735 ILCS 5/2-1117. The Court remanded for consideration of the defendant's sole proximate cause defense.

On remand, the Appellate Court sent the case back to the trial court, holding that the Circuit Court erred by excluding evidence of the defendants' conduct, and the Supreme Court once again allowed an appeal.

The Supreme Court reversed. The Court held that the Circuit Court should have permitted evidence of the settled defendants' conduct with respect to the defendant's sole proximate cause defense, and instructed the jury on the defense. Nevertheless, the Court declined to order a new trial, finding the error harmless.

The lesson for Illinois defense lawyers: **just because your co-defendants have settled out doesn't mean that an empty chair defense is unavailable.**