

IN THE SUPREME COURT OF ILLINOIS

ANNA SKAGGS,	)	On Appeal from the
Petitioner-Appellant,	)	Illinois Appellate Court,
v.	)	Fourth Judicial District
	)	Docket No.: 4-04-0268
SENIOR SERVICES OF)	
CENTRAL ILLINOIS, INC., a corporation,	)	There Heard on Appeal From the Circuit
Defendant-Appellee,	)	Court of the Seventh Judicial Circuit,
and	)	Sangamon County, Illinois
USHMAN COMMUNICATIONS	)	No. 02 L 350
COMPANY, a corporation, and HELP AT)	
HOME, a corporation,)	
	)	The Honorable Leslie Graves,
Defendants,	)	Judge Presiding
)	
SENIOR SERVICES OF CENTRAL)	
ILLINOIS, INC., a corporation,)	
)	
Counterplaintiff-Appellee,)	
v.)	
)	
GWEN ALEXANDER, and)	
HELP AT HOME, INC., a corporation,)	
)	
Counterdefendants.)	

***AMICUS CURIAE* BRIEF OF
THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL IN
SUPPORT OF DEFENDANT-APPELLEE**

David H. Levitt
HINSHAW & CULBERTSON 222
North La Salle Street, Suite 300
Chicago, Illinois 60601
(312) 704-3000

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a constructive role to play in the development of our system of justice and that its interest and those of its many members may be greatly affected by this Court's determination of the important issue which this appeal raises-namely whether settling parties should be included on the verdict form for allocation of fault with all other parties at trial under section 5/2-1117 of the Code of Civil Procedure (735 ILCS 5/2-1117 (West 2000)).

Mindful that it is a privilege and not a right to appear as an *amicus curiae* before the Supreme Court, the IDC is grateful to do so in this case. Based on the experience of its many members, the IDC respectfully submits that its views may be of some assistance in this Court arriving at an interpretation of section 5/2-1117 of the Code of Civil Procedure that is faithful to the legislative intent and good public policy.

ARGUMENT

Prefatory Remarks

In *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 783 N.E.2d 1024 (2002), this Court upheld the constitutionality of section 5/2-1117 of the Code of Civil Procedure, recognizing that its purpose was that "minimally responsible defendants should not have to pay entire damage awards." 203 Ill.2d at 78. In *Lannom v. Kosco*, 158 Ill. 2d 535, 634 N.E.2d 1097 (1994), this Court held that dismissing a settling defendant would not "abolish" the remaining defendant's rights under section 2-1117. 158 Ill.2d at 543. Yet despite these pronouncements by this Court, and starting from several faulty premises, plaintiff nonetheless argues that a settling party's fault should not be considered in determining the percentage of total fault of the non-settling defendant. This Court should declare, once and for all, that the language of and policy behind section 2-1117 will not allow plaintiffs to collect from

minimally responsible but deep-pocketed defendants by manipulating the system through settlements with shallow-pocketed defendants for the amount in their shallow pockets.

I. THE STATUTE REFERS TO THE TIME OF SUIT, NOT THE TIME OF TRIAL

From a pure textual review of the statute, there is absolutely nothing that suggests that an entity must remain as a defendant or third-party defendant at the time of trial in order for that party's fault to be included in the percentage of fault calculation under section 2-1117.

The statute in effect at the time of the incident on November 7, 2000 read in pertinent part as follows:

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 who could have been sued by the plaintiff, shall be severally liable for all other damages.¹

There is nothing in the statute that hints that the defendant sued by the plaintiff or a third party defendant who could have been sued by the plaintiff must remain in the case at the time of trial for its fault to be considered in the calculation. If anything, the statute's language is evidence for just the opposite; section 2-1117 refers to defendants *sued* by the plaintiff, and third party defendants who could have been *sued* by the plaintiff. The legislature chose to focus on the pleadings - the time of suit - not on the time of trial.

Skaggs suggests that if the legislature had intended to include settled parties, it could have said so expressly, and that its use of the word "defendants" implies that settled parties have ceased to be "defendants" as of the time that they settle. This argument is belied by the logic applied by the Supreme Court in *Unzicker*. The Supreme Court there rejected the Fifth

¹ Section 2-1117 was amended effective June 4, 2003, after *Unzicker*, to except the plaintiff's employer from the calculation. IDC contends that this amendment is not retroactive and is unconstitutional as special legislation, but since none of the parties at issue here are the plaintiff's employer, the issue is not currently before this Court.

District's "somewhat fanciful hypothesis of legislative intent" in *Lilly v. Marcal Rope & Rigging, Inc.*, 289 Ill. App. 3d 1105, 682 N.E.2d 481 (5th Dist. 1997), that the legislature could have included employers specifically if that was what it intended. Instead, the Court noted that it would have been just as easy for the legislature to exclude employers if that is what it intended. *Unzicker*, 203 Ill.2d at 77-78. Similarly, if the legislature had intended to require that settling parties be excluded, it would have referred to the time of trial, rather than the time of suit.

It defies logic to suggest that the legislature did not intend to include settling and dismissed parties in the percentage calculation. The entire purpose of the statute, as recognized by the Supreme Court in *Unzicker*, was to protect minimally responsible but deep pocketed defendants from having to pay for the percentage of fault of substantially responsible but shallow-pocketed defendants. The statute would be rendered meaningless if it could be avoided by so simple a means as settling with the shallow-pocketed defendant for the amount in his shallow pockets. It is a gross contortion of the legislative intent to suggest that the legislature intended to allow the plaintiff to manipulate the application of the statute by entering into a settlement with the shallow-pocketed defendant.

II. THIS COURT HAS PREVIOUSLY RECOGNIZED THAT SETTLING PARTIES SHOULD BE INCLUDED IN THE PERCENTAGE OF FAULT CALCULATION

In *Lannom v. Kosco*, 158 Ill. 2d 535, 634 N.E.2d 1097 (1994), the plaintiff sued one defendant, Kosco, for injuries arising from an automobile accident. Kosco brought a third party action for contribution against the plaintiff's employer. The employer agreed to waive its workers' compensation lien, and sought dismissal pursuant to *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 585 N.E.2d 1023 (1991). Kosco opposed this dismissal on several grounds, including prejudice to his right to the protection afforded by Section 2-1117.

This Court allowed the dismissal, but in doing so, stated:

Moreover, the defendant's rights under Section 2-1117 are not abolished simply because a defendant or third party settles. Of is dismissed from an action. The jury may still assess the remaining defendants' relative culpability, and if the degree of fault attributable to one or more of the defendants is less than 25%, those defendants' liability is several only.

Lannom, 158 Ill. 2d at 543. As the Court well knew, *there was only one defendant remaining in that case*. Consequently, there was no one else with whom the defendant could have shared fault at trial unless it was with the settling party. If this Court meant what it said and said what it meant—that a defendant's rights under section 2-1117 are not "abolished" merely because the only other defendant or third-party defendant has settled and been dismissed from the case, then logically an allocation of fault with the dismissed party is still required.

Also indicative that the fault of settling parties is to be assessed under section 2-1117, *Lannom* cited an Illinois Bar Journal article with approval.² The authors of that article explain that a plaintiff's settlement with a defendant or third-party defendant does not affect a nonsettling defendant's rights under section 2-1117 because the fault of the settling party is taken into account when assessing the fault attributable to the nonsettling defendant. 79 Ill.

B.J. at 125. Walsh & Doherty observe as further relevant here:

It might be suggested that, because it is silent on the question of settlement, section 2-1117 should be read together with the Contribution Act so that the latter's 'good faith' settlement provisions might be 'borrowed' for section 2 1117. Such a construction would mean, however, that one defendant's 'good faith' settlement could force another minimally culpable, non settling defendant to bear virtually all of the plaintiff's damages. This would contravene the clear language of section 2-1117, which indicates that a minimally culpable defendant should not be liable for more than its share of damages.

79 Ill. B.J. at 144. Thus, this Court's citation to Walsh & Doherty is further confirmation that the appellate court here correctly included the settling parties' on the verdict form.

² Walsh & Doherty, "Section 2-1117: Several Liability's Effect on Settlement and Contribution," 79 Ill. B.J. 122 (1991)

Moreover, settling parties are already included on the verdict form for other purposes. The jury must consider the fault of all parties and non-parties whose conduct might have caused the plaintiff's injuries after this Court adopted the doctrine of comparative negligence in *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). As the Appellate Court held even before the enactment of section 2-1117 in 1986, a "[c]onsideration of the negligence of both parties and nonparties to an action is essential for determining liability commensurate with fault." *Bofman v. Material Service Corp.*, 125 Ill. App. 3d 1053, 1064, 466 N.E.2d 1064 (1st Dist. 1984). Indeed, whenever a plaintiff's comparative negligence is involved, the jury needs to determine the liability of all tortfeasors to determine accurately the extent of the plaintiff's responsibility for his or her own injuries. *See e.g., Smith v. Central Illinois Public Service Co.*, 176 Ill. App. 3d 482, 496, 531 N.E.2d 51 (4th Dist. 1988); *Parsons v. Carbondale Township*, 217 Ill. App. 3d 637, 648, 577 N.E.2d 779 (5th Dist. 1991); see also Illinois Pattern Jury Instructions, Civil, No. B.45.03A Comment at 208 (4th ed. 2000). Likewise, in a contribution action, the parties have a right to an allocation of fault to all tortfeasors, parties and nonparties alike, who are subject to liability in tort. *Truszewski v. Outboard Marine Motor Corp.*, 292 Ill. App. 3d 558, 685 N.E.2d (1st Dist. 1997). *See also, Lombardo v. Reliance Elevator Co.*, 315 Ill. App. 3d 111, 124-25, 733 N.E.2d 874 (1st Dist. 2000).

Again, it defies common sense to suggest that in the face of its own prior pronouncements recognizing a nonsettling party's right to an apportionment of fault, as well as the case law cited above that requires a settling party's fault to be considered in allocating fault, the legislature intended to exclude those settling parties only for several liability determinations.

III. THE ASSUMPTIONS AND HYPOTHETICAL ALLOCATIONS IN PLAINTIFF'S BRIEF ARE ERRONEOUS

A. No Defendant Has Sought A Double Set-Off Such As Posited By Plaintiff

Skagg's supplemental brief is replete with odd hypothetical calculations and assumptions on positions that no defendant has ever taken, and which IDC expressly rejects. Perhaps the most telling of these is the assumption, on which all of the hypothetical calculations are based, that the non-settling defendant would somehow get a double benefit, because it would get both a set-off on the dollar amount paid by the settling party, and then its percentage of fault would be assessed only against this reduced amount.

However, no defendant has ever sought or requested a double set-off, nor has Senior Services sought one here. If a defendant is found severally liable, the IDC agrees that - as to its several liability share (subject to one caveat - that the plaintiff can never recover more than the jury verdict) - is not entitled to a set-off by the amount paid by the settling party. The IDC is not aware of any case in which a defendant has ever sought a double set-off; this Court should not be persuaded by a make-believe straw man erected by Skaggs simply so it can be struck down.

Section 2-1117 posits that even a minimally responsible party has some joint and several liability - for medical expenses. As to that portion of liability, since the non-settling defendant remains jointly and severally liable, it should still be entitled to a dollar for dollar set-off. Nothing in section 2-1117, nor anywhere else in the law, purports to change any aspect of the prior law of joint and several liability regarding medical expenses.

However, the rule of set-off in joint and several liability situations is designed to ensure that the plaintiff makes only one recovery. Where that policy is not implicated, there is no reason to provide a dollar for dollar set-off. Because application of section 2-1117 does

not implicate that policy, with one possible exception noted below, there is no reason in law or logic for a defendant to seek or to receive a double set-off.

Assume a \$100,000 verdict (for this hypothetical, we assume no medical expenses are included in the calculation), in which all parties, including settling parties, have been included on the verdict for a fault allocation. Assume further that the plaintiff has settled with Defendant A for \$50,000 (found, though, by the jury to be 80% at fault), and that Defendant B has been found liable for 20% (and is thus only severally liable for non-medical damages). Plaintiffs double set-off assumption would mean that Defendant B would be liable for only \$10,000 ($\$100,000 - \$50,000 \times 20\% = \$10,000$). However, the true calculation would not give Defendant B both a dollar for dollar set-off and a percentage application. The plaintiff would recover a total of \$70,000. Since the plaintiff is not making more than only one recovery, there is no reason for Defendant B to get the dollar set-off. Because of its several liability share, Defendant B is not being treated unfairly either - it is paying the precise amount that the jury has determined it should.

The exception is where the plaintiff would make more than a full recovery. If instead of settling for \$50,000 with Defendant A, assume the plaintiff settled for \$95,000 with that defendant. With the same jury verdict, requiring Defendant B to pay its full 20% share would result in the plaintiff recovering \$115,000, more than the \$100,000 determined by the jury. In that situation, Defendant B should be liable for \$5,000, the difference between the amount previously received by the plaintiff and the amount of damages as determined by the jury.

B. Skaggs' Assumption That Settlements Are The Paramount Public Policy Is Wrong

Throughout plaintiffs brief, a primary basis for her position is that *the* public policy behind section 2-1117, and every other tort principle for that matter, is to promote settlement.

That is, quite simply, wrong. Certainly, settlement is *one* important consideration, but this Court and other courts have made it clear that it is neither paramount nor alone the purpose of the civil justice system. Rather, as the legislature made clear when it enacted section 2-1117 in the first place, proper allocation of fault among the parties is just as important a public policy as promoting settlement. *Bowers v. Murphy & Miller, Inc.*, 272 Ill. App. 3d 606,610, 650 N.E.2d 608 (1st Dist. 1995).

C. Skaggs' Hypothetical Percentage Calculations Are Flawed And Unrealistic

The plaintiff's brief is full of hypotheticals, all of which improperly assume that defendants would seek and be entitled to a double set-off. Instead of those hypothetical situations, consider the following:

1. A plaintiff gets into a car with a drunk driver. The driver is stopped by the police, but they negligently allow him to proceed. Thereafter, the drunk driver and his passenger are involved in a one car accident. The drunk driver settles with the plaintiff for his \$20,000 policy limit. The jury determines that the passenger is 35% comparatively negligent for knowingly getting into a car with the drunk driver, but the target defendant is the deep pocket Village which employs the police officer who did not arrest them earlier. Should the Village be liable for the entire judgment, after the comparative negligence reduction simply because the primarily at fault drunk driver had limited financial means?

2. A driver with his family in the car comes upon a prior accident scene, but does not take appropriate action, and driving out of control, runs into the rear of other vehicles stopped at the scene at a high rate of speed. Two lawsuits ensue, which are tried together: (a) the lawsuit by his family against him and the other vehicle operators (the other vehicle operators file a contribution action against him), and (b) he files his own lawsuit for his own

serious injuries against the other vehicle operators. He settles with his family members for his insurance policy limits. The jury finds, as to lawsuit (b), that he is entitled to no recovery because he was *at least* 51 % at fault for causing the accident. Should the remaining vehicle operators be liable for the entire judgment in favor of his family members simply because they did not want to pursue their spouse/father and because he had limited financial means?

Of course, neither of these are really hypothetical situations. Fact Pattern 1 is from *Ozik v. Gramins* 345 Ill. App. 3d 502, 799 N.E.2d 871 (1st Dist. 2003). Fact Pattern 2 is from *Yoder v. Ferguson*, Consolidated Docket Nos. 1-04-3214 & 1-04-3230, currently pending before the Illinois Appellate Court, First Judicial District. In both cases, the trial courts refused to include the shallow pocketed settling party in the verdict form, even though in each instance, the settling party was clearly substantially at fault. These "hypotheticals" emphasize how leaving out settling party is diametrically opposed to the intent of Section 2-1117. In each case, the minimally responsible party was left holding the bag, while the primarily responsible party (Ozik's drunk driver and Yoder's at least 51 % at fault father) was let out of the case early. In each case, the plaintiff was allowed to determine whose fault would be considered, because the plaintiff decided with whom to settle, and for how much. It is impossible to reconcile these results with the statute; it is impossible to believe that the legislature, whose intent was undeniably to protect defendants, intended to give complete discretion to the plaintiff's attorney to undermine the very protections envisioned by the legislature.

CONCLUSION

For all of the foregoing reasons, the Illinois Association of Defense Trial Counsel respectfully requests that this Court affirm the opinion and judgment of the Illinois Appellate Court, Fourth District, and hold that settled parties are included for purposes of apportioning fault under section 5/2-1117 of the Code of Civil Procedure.

Respectfully submitted,

David H. Levitt
Hinshaw & Culbertson
222 North LaSalle Street, Suite 300
Chicago, Illinois 60601
(312) 704-3000