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Civil Practice and Procedure

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Who Knew?
Sole Means More Than One

In *Douglas v. Arlington Park Racecourse, LLC,* 2018 IL App (1st) 162962, the Illinois Appellate Court, First District, recently ruled that the defendant in a negligence action was entitled to the jury instruction on sole proximate cause where the defense presented evidence to support theories that either one of two non-parties was the sole proximate cause of the plaintiffs' injuries. Justice Gordon filed a vigorous and lengthy dissent, asserting that sole means one and that the sole proximate cause instruction confused the jury and prejudiced the plaintiffs' right to a fair trial. This is an important issue for defense practitioners, as it is not infrequent that there is more than one potential at fault tortfeasor who is not on the verdict form.

Background Facts and Procedural History

Plaintiff Rene Douglas was a professional jockey. In 2009, Rene was paralyzed from the chest down after falling from his horse during a race at Arlington Park racecourse (Arlington Park). *Douglas*, 2018 IL App (1st) 162962, ¶ 3. Douglas and his wife sued Arlington Park and its owner Arlington Park Racecourse, LLC, as well as Churchill Downs, which owns Arlington Park Racecourse, LLC, Martin Collins, the manufacturer of a synthetic horse racing surface (Polytrack), and Keeneland Ventures, a Polytrack distributor. *Id.* ¶¶ 3-4. The only remaining defendants at the time of trial were Arlington Park and Churchill Downs. *Id.* ¶ 5.

The plaintiffs' theory at trial was that Rene's injury was caused by the defendants' negligent maintenance of the Polytrack, which plaintiffs alleged should have better protected a falling jockey. *Id.* ¶ 8. Arlington Park's personnel were trained to maintain the Polytrack by the manufacturer, Martin Collins, which also provided a manual with recommendations and recommended equipment. *Id.* ¶ 7. The plaintiffs' experts opined that Rene's injuries were caused when Rene "pocketed" into the Polytrack after falling due to an unsafe angle on the track. *Id.* ¶ 8.

At trial, the defendants advanced four arguments: "(1) they were not negligent in maintaining the track because they followed the instructions in the Martin Collins manual about maintaining the Polytrack; (2) there was nothing wrong with the track; it did not cause Rene's injury; (3) if they were negligent, they were not liable because the actions of another jockey racing that day, Jaime Theriot, was the sole proximate cause of Rene's injury; and (4) if they were negligent in maintaining the track, it was the negligence of Martin Collins, in failing to apprise defendants about the proper maintenance of the track, that was the sole proximate cause of Rene's injury." *Id.* ¶ 10.

Regarding the conduct of the other jockey, the defendants' expert testified that Rene's accident was caused when the horse jockeyed by Theriot "clipped" Rene's horse during the race, causing the horse to fall. *Id.* ¶ 13. On the subject of the Martin Collins manual, defense witnesses repeatedly testified that the manual did not mention "dynamic shear angle"

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or "vertical load," which according to the plaintiffs, affected the impact of his fall and caused his injuries. The track's superintendent testified that he was familiar with the concepts, but did not measure them, or conduct maintenance to control them, because the Martin Collins manual did not say it was necessary to do so. *Id*. ¶ 14.

Over the plaintiffs' objection, the court instructed the jury using the long form of Illinois Pattern Jury Instructions, Civil, No. 12.04, which states:

> More than one person may be to blame for causing an injury. If you decide that the defendants were negligent and that their negligence was a proximate cause of injury to the plaintiffs, 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 other person other than the defendant, then your verdict should be for the defendant.

Douglas, 2018 IL App (1st) 162962, ¶ 16.

The court allowed defendants to issue a special interrogatory, which asked: "On the date of the accident and at the time and place of the accident in question in this case was the conduct of some person other than the defendants the sole proximate cause of the plaintiffs' injuries? [Yes or No]." *Id.* ¶ 17.

The jury returned a verdict in favor of defendants and answered "yes" to the special interrogatory. The plaintiffs filed a posttrial motion arguing, in part, that the trial court erred in allowing the sole proximate cause issue to go before the jury. *Id*. ¶ 18. The trial court granted the motion, finding that the fact that defendants introduced evidence of two alternative proximate causes, the jockey and Martin Collins, precluded them from arguing that Theriot's conduct was the sole proximate cause of Douglas' injuries. Further, the trial court found that the special interrogatory's reference to "some person other than defendants" was ambiguous.

Appellate Court Opinion

Defendants appealed, and the appellate court reversed the trial court's order granting the plaintiffs a new trial, finding that the jury instruction and special interrogatories were proper, such that the trial court had no basis to grant a new trial.

In reaching that conclusion, the court noted that "the sole proximate cause theory is simply one way a defendant argues that the plaintiff failed to carry its burden of proof on proximate cause—specifically, by arguing that the negligence of another person or entity, not a party to the lawsuit, was the only proximate cause of the plaintiff's injuries." *Douglas*, 2018 IL App (1st) 162962, ¶ 36 (citing *Lowe v. Norfolk and Western Railway Co.*, 124 Ill. App. 3d 80, 94 (5th Dist. 1984)). Thus, the sole proximate cause theory "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." *Douglas*, 2018 IL App (1st) 162962, ¶ 36 (quoting *Lowe*, 124 Ill. App. 3d at 94 (emphasis in original)).

The court recognized that the defendant who blames two non-parties argues that: "(1) Non-Party A's negligence was the sole proximate cause of the plaintiff's injuries; (2) Non-Party B's negligence was the sole proximate cause; or (3) the negligence of Non-Party A and Non-Party B, collectively, was the sole proximate cause." *Douglas*, 2018 IL App (1st) 162962, ¶ 37. Those alternative arguments are simply different ways of saying the same thing, namely, the plaintiff failed to prove that the party-defendant's negligence was a proximate cause of the plaintiffs' injuries because 100 percent of

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the cause of the injuries was the conduct of Non-Party A and/or Non-Party B. *Id.* As the court reasoned, "[t]he critical point here is that the defendant's level of contribution to the plaintiff's injuries is 0%; whether the 100% of the blame falls on Non-Party A, Non-Party B, or both, is of no import." *Id*.

The court relied on two decisions from the Illinois Supreme Court, which support that conclusion, namely, *Ready v. United/Goedecke Services, Inc.*, 238 Ill. 2d 582, 591 (2010), and *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 444 (2009).

In *Nolan*, the plaintiff sued 12 companies alleging that her decedent developed mesothelioma after being exposed to asbestos-containing products, but 11 of the 12 defendants were dismissed before trial. *Nolan*, 233 Ill. 2d at 419. The trial court barred the remaining defendant from introducing evidence of the decedent's exposure to the non-parties' products and was found liable. *Id*. at 421-26.

The Supreme Court held that barring that evidence was error, noting that the defendant "wishe[d] to offer evidence of decedent's other exposures *** to contest causation through the use of the sole proximate cause defense," *Id.* at 438, and emphasizing 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." *Id*. at 442 (emphasis added and internal quotation marks omitted).

Ready was issued a year after *Nolan*, a case where the plaintiff's decedent was killed when a scaffolding truss fell eight stories and hit him, and before trial, the plaintiff settled with the general contractor and the decedent's employer. *Ready*, 238 Ill. 2d at 584. On the plaintiff's motion, the trial court excluded evidence of the settling parties' conduct over the defendant's objection and the defendant was found liable. *Id.* at 586.

The Supreme Court, following *Nolan*, again reversed the trial court's decision, reasoning that the defendant had the right to argue that the general contractor should have provided an external crane to lift the scaffolding which would have eliminated the decedent's need to even be present at the location where he was injured. *Id.* As to the other settling defendant, the defendant could have introduced evidence that the decedent's employer employed unqualified workers, improperly controlled the signaling on the project, and failed to follow its own safety manual. *Id.* at 591-92. Since "[t]his evidence would have tended to show that the settling defendants' conduct was the sole proximate cause of the accident, *** the trial court erred in excluding it and refusing to give the second paragraph" of IPI Civil No. 12.04. *Id*. at 592.

Following *Nolan* and *Ready*, the *Douglas* appellate court reasoned that it cannot escape the conclusion that the sole proximate cause theory is available to a defendant even when that defendant is claiming that more than one nonparty actor's negligence was the sole proximate cause of plaintiff's injuries. *Douglas*, 2018 IL App (1st) 162962, ¶ 44. In doing so, the court pointed out that the defendant in *Ready* placed the blame on two separate non-party actors as the sole proximate cause and the defendant in *Nolan* made that claim against eleven parties. *Id*.

Moreover, the court distinguished this case from *Holton v. Memorial Hospital*, 176 Ill. 2d 95 (1997), and declined to follow *Clayton v. County of Cook*, 346 Ill. App. 3d 367 (1st Dist. 2003) and *Abruzzo v. City of Park Ridge*, 2013 IL App (1st) 122360, on which the plaintiffs relied. It noted that while the Illinois Supreme Court in *Holton* upheld a decision to deny a sole proximate cause instruction, it had nothing to do with the number of non-party actors and everything to do with the defendant's failure to introduce evidence that the non-party actors committed negligence. *Douglas*, 2018 IL App (1st) 162962, ¶ 46 (citing *Holton*, 176 Ill. 2d at 134).

Clayton and *Abruzzo* cannot be recognized with the Illinois Supreme Court decisions in *Nolan* and *Ready* insofar as they both "grounded in the notion that the word 'sole' connotes the singular, and thus 'sole proximate cause' must refer only to a single nonparty actor or cause, not multiple." *Douglas*, 2018 IL App (1st) 162962, ¶ 57. While the appellate court did not find that position illogical, it found that it is not the only possible conclusion. As the court reasoned: "[i]f

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we were to delve into linguistics, the word 'sole' does not necessarily imply only the singular. Merriam-Webster's Dictionary defines 'sole' not only as 'having no companion: Solitary' or 'being the only one' but also as '*belonging exclusively or otherwise limited to one usually specified* individual, unit, or *group*.'" *Douglas*, 2018 IL App (1st) 162962, ¶ 57 (quoting Merriam-Webster Online Dictionary) (emphasis in original).

The court went on to state:

> The paramount attribute of the word "sole" is its exclusivity, not its number. Used in the context of "sole proximate cause," the point is that the group of nonparties are exclusive in the sense that their collective negligence was 100% of the plaintiff's injury, and the party-defendant's contribution to the injury was zero. *** Whether one of those nonparties is 100% responsible, or whether the 100% is divvied up among several nonparties, likewise makes no difference. *** If Defendant A is on trial with Codefendants B and C in a negligence action, nobody would deny that Defendant A could ask the jury to find that the codefendants, individually or collectively, bore 100% of the blame for causing injury to the plaintiff. It might point all the blame on one of the two codefendants; it might say they were collectively responsible for all the cause; it might argue both. The point of the argument is that *none* of the fault can be attributed to Defendant A, and thus the plaintiff has failed to carry its burden of proof as to Defendant A. Nobody would deny that Defendant A would be perfectly within its rights to make that argument.

Douglas, 2018 IL App (1st) 162962, ¶¶ 58-59.

Since there was no question that the defendants introduced evidence to support theories that either the other jockey or Martin Collins could have been the sole proximate cause of Douglas' injuries, the court concluded that the jury instruction was proper. *Id*. ¶ 63.

The Dissent

The dissent argued that it was "absurd" to suggest that the conduct of two different actors could be the "sole" proximate cause of an injury because such an interpretation is at odds with the meaning of the word "sole." *Douglas*, 2018 IL App (1st) 162962, ¶ 128. The dissent also pointed out that in *Nolan* and *Ready*, the issue was whether the court properly excluded evidence that non-party actors were the cause of the plaintiffs' injuries, not whether the sole proximate cause jury instruction was properly given. *Id*. ¶ 121. As the majority found, however, there was no other reasonable "way to interpret *Ready*, 238 Ill. 2d at 592, when that court held that, because the evidence in that case 'would have tended to show that the *settling defendants' conduct* was the *sole* proximate cause of the accident, *** the trial court erred in excluding it and refusing to give the second paragraph' of IPI Civil No. 12.04." *Douglas*, 2018 IL App (1st) 162962, ¶ 62. Since there were two settling defendants in *Ready*, the appellate court found that it could only read that quote as stating that the defendant could have prevailed at trial had it established that 100 percent of the cause of the plaintiff's injury was attributable to the conduct of either settling defendant. *Id*. ¶ 37.

The dissent's reasoning for the position that the trial court correctly granted a new trial stems from the fact that the alleged negligence of the other jockey and of Martin Collins were separate, unrelated possible causes of Douglas' injury. *Id*. ¶ 123. According to the dissent, this makes the case distinguishable from *Nolan*, where eleven other non-parties'

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asbestos could have combined to cause the decedent's injuries, and *Ready*, where the contractor and employer's conduct could have together, caused the plaintiffs' injuries. *Id*. ¶¶ 58-59.

The dissent does not take issue with allowing a defendant to argue to the jury that either one or other entities were the cause of the plaintiff's injuries while the defendant was blameless, but believes that the sole proximate cause instruction is inappropriate where the defense argues that more than one entity could have been 100 percent liable for the plaintiff's injury, especially if those entities actions were unrelated. *Id*. ¶ 134.

Practical Implications

As a result of the recent decision, defense counsel in negligence actions have a stronger argument for requesting a sole proximate cause instruction when presenting evidence that non-party actors were the cause of the plaintiff's alleged injuries, even where that evidence shows alternative causes. As the majority noted in *Douglas*, the point of the sole proximate cause instruction is that the plaintiff failed to prove that the defendant caused his or her injuries because an entity other than the defendant is 100 percent liable while the defendant is blameless. It should not make a difference if the evidence shows that the injury could have been caused by non-party A, non-party B, or a combination of the conduct of A and B.

Plaintiffs may challenge that instruction by making a good faith argument that the decision in *Douglas* was incorrect for the reasons cited by the dissent and its reliance on *Holton*, *Clayton* and *Abruzzo*. It is notable, however, that *Holton* was specifically distinguished by the majority, and that since both *Clayton* and *Abruzzo* were decided by the first district, there is no split of authority, and those opinions are now overruled on this point of law.

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