

DEFENDANT CAN NAME SUSPECTED TORTFEASOR AS A NON-PARTY AT FAULT

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State v. Mahoney

Arizona Court of Appeals, May 16, 2019

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A motorist was killed when he collided with horses that had wandered onto a state roadway. Tracks showed the horses had passed through an open gate in a barbedwire fence maintained by the State adjacent to the highway. The motorist's parents sued the State (and others) alleging that the State negligently failed to secure the gate in that fence. Investigators had spotted tire tracks of one or more ATVs leading through the gate, so the State filed a notice of nonparty at fault asserting that "unknown ATV riders" left the highway gate open despite a sign saying "Keep Gate Closed."

The trial court struck the notice, noting the State had not tried to identify or locate the ATV riders and there was no evidence that any nonparty "was actually known" to be at fault.

On the State's special action petition, the court of appeals reversed. It held that the State could properly name as a nonparty at fault unknown individuals whom it alleged negligently left the gate open, even though the State could not identify that person by name. The court noted the importance of the defendant's statutory right to be assessed no more than its proportionate share of fault; and cited previous cases allowing nonparty at fault notices even though the defendant did not know the identity of the nonparty. For example, a supermarket could name an unknown person who dropped something on the floor resulting in the plaintiff's slip and fall. A defendant bar could name the person who assaulted plaintiff, even though the assaulter's identity was unknown. And a defendant in a car crash case could name the unknown individual who had waved the plaintiff through the intersection, thus causing the defendant and plaintiff to crash. The fact that the State had not tried to uncover the identity of the ATV drivers would go to the weight of that evidence at trial, rather than invalidate the nonparty at fault notice. The important fact was the existence of the nonparty, not his identity.

Plaintiff argued that in the cited cases, the nonparty undisputedly committed a fault-worthy act, whereas here no one saw ATV riders leave the gate open and thus their fault was speculative. The court rejected the argument. No one disputed that the gate was open; and plaintiffs had no evidence that it could have been opened any other way. Indeed, the horses' owner testified that these gates "don't get opened very often by people that can't close them." Since plaintiffs were suing the State for leaving the gate open, the State was entitled to argue that the jury should apportion fault to the ATV riders if it finds they opened the gate without closing it.

[click here to read the full opinion](#)