

No. 127327

 IN THE SUPREME COURT OF ILLINOIS

MIDWEST SANITARY SERVICE,
NANCY DONOVAN, and
BOB EVANS, SR.,

Plaintiffs-Appellees,

-vs-

SANDBERG, PHOENIX &
VON GONTARD, P.C.,
JOHN GILBERT, and
NARCISA SYMANK,

Defendants-Appellants.

) Appeal from the Appellate
) Court of Illinois,
) Fifth District

) No: 5-19-0360

) Appeal from the
) Circuit Court of Madison
) County

) No. 18-L-811

) Honorable David W. Dugan,
) Judge Presiding

) Oral Argument Requested
)

 REPLY BRIEF OF THE APPELLANTS, SANDBERG, PHOENIX & VON
GONTARD, P.C., JOHN GILBERT AND NARCISA SYMANK

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ORAL ARGUMENT REQUESTED

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ARGUMENT

1. The Statutory Prohibition on the Recovery of Punitive Damages as well as the Public Policy of Illinois Bars Midwest from Attempting to Recoup its Punitive Damages from its Defense Attorneys.

A. 735 ILCS 5/2-1115 prohibits the recovery of the punitive damages sought by Midwest.

It is undisputed that the jury in the underlying case found that Midwest illegally fired Paul Crane because he reported Midwest's Environmental violations to the Illinois Environmental Protection Agency (hereafter "IEPA") and awarded Crane \$625,000 in punitive damages. It is also undisputed that Midwest is now suing the attorney Defendants to recover some or all of those punitive damages. That clearly triggers the application of 735 ILCS 5/2-1115. Specifically, that statute expressly provides:

"In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal . . . malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed."

In short, a Plaintiff may not seek to recover any punitive damages in a legal malpractice case. Despite this express prohibition against punitive damages, Midwest argues that it does not apply to this case.

Midwest argues that it is not seeking punitive damages because it is not suing the attorney Defendants for any fraudulent or intentional conduct. Instead, it is Midwest's position that it is simply seeking to recover some or all of its out of pocket losses. While Midwest clearly attempts to re-characterize these punitive damages as compensatory damages, the fact remains that the damages at issue were punitive damages in the underlying case and that will not change. Indeed, in proving up the "case within a case," the jury in the instant case would necessarily have to be instructed on such punitive

damages under Illinois Pattern Jury Instruction 35.01. Given the plain language of 735 ILCS 5/2-1115, therefore, those punitive damages are simply not permitted in the instant legal malpractice case. See Tri-G, Inc. v. Burke, Bosselman & Weaver, 222 Ill.2d 218, 856 N.E.2d 389, 411 (2006) (language of statute must be given “its plain and ordinary meaning”).

The sole crux of Midwest’s argument is that these lost punitive damages “must be reimbursed by these Defendants,” and that 735 ILCS 5/2-1115 therefore cannot apply. See Page 7 of Appellee’s Brief. Notably absent from Midwest’s analysis, however, is any discussion about 735 ILCS 5/2-1115’s purpose of protecting all attorneys in the legal marketplace and/or how that public policy is served by requiring only civil defense attorneys to reimburse their clients for lost punitive damages. Nor does Midwest explain why a legal malpractice plaintiff should have an unfettered right to seek damages that cannot be limited by the State of Illinois. That is because any such right may indeed be limited and has already been so limited with the enactment of 735 ILCS 5/2-1115, just as the State of Illinois has limited a plaintiff’s right to recover damages in many other instances. See Page 15 of Appellants’ Brief. In sum, the statute does apply to limit Midwest’s ability to be reimbursed for its lost punitive damages.

Notwithstanding the plain language of the statute, Midwest also argues that it does not apply because it is not seeking the windfall that would normally be associated with the recovery of punitive damages. To the contrary, Midwest is indeed seeking a windfall given that it is trying to recover some or all of those punitive damages even if it is again found that Midwest did fire Mr. Crane in retaliation for his reports to the IEPA. In other words, by insisting that it is not required to prove its innocence, Midwest seeks to be reimbursed

for some or all of those lost punitive damages even if the jury again finds that Midwest acted unlawfully in firing Mr. Crane under Count 1 (which seeks compensatory damages) and/or under Count 2 (which seeks punitive damages). That would clearly violate both the language and purpose of the statute as well as the public policy in Illinois that the burden of punitive damages must remain with the wrongdoer. See Tri-G, Inc., 856 N.E.2d at 413 (imposing liability for punitive damages on the attorney neither punishes the culpable tortfeasor, nor deters that tortfeasor and others from committing similar wrongful acts).

Simply put, the statutory prohibition on punitive damages speaks for itself and Midwest's claim for punitive damages should have been dismissed or stricken.

B. Midwest is required by the public policy of Illinois to plead and prove that it would have prevailed to recover any of the damages being sought.

Even if Illinois did not have a statutory prohibition on the recovery of punitive damages in legal malpractice cases, it would nevertheless be improper to allow the recovery of such lost punitive damages unless Midwest proved that it did not fire Mr. Crane because of his reports to the IEPA. Indeed, the public policy in Illinois mandates that the burden of punitive damages must remain on the wrongdoer as that serves the purposes of punishing the culpable tortfeasor and deterring that tortfeasor and others from committing such wrongful acts going forward.

Notwithstanding the public policies of punishment and deterrence, Midwest argues that it does not have to prove it is innocent of wrongdoing and that even if it behaved unlawfully, it should still be entitled to seek reimbursement of some or all of the punitive damages that it paid. That is not the law, and Midwest makes no effort to explain why the cases cited by the attorney Defendants in their brief are not probative. See, e.g.,

Governmental Interinsurance Exchange v. Judge, 221 Ill.2d 195, 200, 850 N.E.2d 183 (2006) (Plaintiff must prove “that ‘but for’ the attorney’s negligence, the client would have been successful in the underlying suit”). Nor do the cases relied upon by Midwest support the proposition that a guilty client should nevertheless be entitled to recover damages from its attorney. See Nelson v. Quarles & Brady, LLP, 997 N.E.2d 872, 375 Ill.Dec. 561 (1st Dist. 2013) (Motion to Dismiss was denied because client alleged he would have prevailed in the underlying case but for the attorney’s failure to assert available defenses); Georgou v. Fritzshall, 1995 WL 248002 (N.D. Ill. 1995) (clients alleged that they would have won the underlying suit but for the malpractice of the attorneys); Praxair, Inc. v. Hinshaw Culbertson, 235 F.3d 1028 (7th Cir. 2001) (Motion for Summary Judgment was granted in favor of attorneys where client was unable to prove it would have won the underlying case but for the claimed malpractice of its attorneys).

Simply put, the Appellate Court erred in allowing the recovery of punitive damages given Midwest’s insistence that it is seeking some or all of those damages from the attorney Defendants even if it does bear some guilt. That defies Illinois’ public policy behind punitive damages and should be reversed.

C. The out of state cases relied upon by Midwest are largely devoid of any discussion of the public policies behind punitive damages and are therefore irrelevant.

In its Amicus Curiae Brief, the Illinois Defense Counsel referred this Court to cases from other states where clients were not allowed to recover lost punitive damages from their attorneys, including Georgia, California, New York and Kentucky. Midwest in turn has referred this Court to several other states that have reached contrary conclusions or signaled a willingness to allow the recovery of lost punitive damages. The Defendants are

not going to discuss those competing cases in any substantial way other than to point out that most of them do not in any way address the public policy implications of allowing punitive damages to be shifted to another. See, e.g., Hunt v. Dresie, 241 Kan. 647, 740 P.2d 1046 (Kan. 1987) (no discussion of public policy); Haberer v. Rice, 511 N.W.2d 279 (S.D. 1994) (no discussion of public policy); Scognamillo v. Olsen, 795 P.2d 1357 (Co. 1990) (summarily disagreed with argument about public policy considerations without discussing same). Thus, those cases are not instructive in this matter. Moreover, none of the states referred to by Midwest have enacted a statutory prohibition on the recovery of punitive damages in legal malpractice cases. Such cases should therefore be disregarded.

D. There is a societal cost in exposing defense attorneys to the risk of potentially unlimited liability for punitive damages lost by their clients.

Midwest appears to belittle the Defendants' arguments that there will be a substantial cost if defense attorneys are exposed to the unrestrained risk of punitive damages. More specifically, Midwest argues that competent defense attorneys "have nothing to fear" by being exposed to lost punitive damages. See Page 14 of Appellee's Brief. Such an assertion is rather trite, particularly coming from a party who is not an attorney, let alone a defense attorney. It also completely ignores the fact that nothing prevents an unhappy client, even a guilty client, from blaming a defense attorney when a case is lost and then taking a free shot at recovering some or all of the lost punitive damages, either as leverage for a settlement or otherwise. This is a real risk, and contrary to Midwest's position, 735 ILCS 5/2-1115 protects all Plaintiffs' attorneys and Defendants' attorneys from this exposure to lost punitive damages.

Indeed, the Supreme Court of Illinois noted in discussing the Ferguson case that exposure to lost punitive damages “would likely increase legal malpractice premiums, cause insurers to exclude coverage for those damages, or discourage insurers from providing professional liability insurance . . .” Tri-G, 222 Ill.2d at 262 (discussing Ferguson v. Lieff, et al., 30 Cal.4th 1037, 69 P. 3d 965 (2003)). That would in turn “probably make it more difficult and costly for consumers to obtain legal services . . .” Id. Midwest argues that this Court was simply quoting from the Ferguson case and that this was not the express holding in the Tri-G case. That does not make the rationale any less true or persuasive however. Simply put, there will be a societal cost if defense attorneys are excluded from the protections of 735 ILCS 5/2-1115, and Midwest’s cynical effort to suggest that does not matter in the State of Illinois should be soundly rejected.

CONCLUSION

In short, the Opinion of the Appellate Court allowing Midwest to recover its lost punitive damages undermines the plain language and purpose of 735 ILCS 5/2-1115 and creates an unjustified exception to the statute against all civil defense attorneys. Such Opinion further violates the public policy in Illinois that a wrongdoer may not shift its punitive damages to another. That is particularly true in this case given that Midwest is claiming the right to recover some or all of its lost punitive damages even if it is again found to have unlawfully fired Mr. Crane. In sum, the Appellate Court erred in answering the certified question in the negative because both 735 ILCS 5/2-1115 and Illinois public policy bar the recovery of punitive damages in a legal malpractice case.

Defendant respectfully requests that this Honorable Court REVERSE the Opinion of the Appellate Court, ANSWER the Rule 308 certified question in the affirmative, and REMAND this case to the Circuit Court for further proceedings.

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 IN THE SUPREME COURT OF ILLINOIS

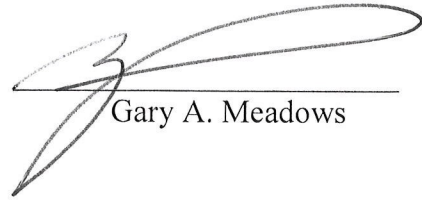
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| |) | Honorable David W. Dugan, |
| Defendants-Appellants. |) | Judge Presiding |
| |) | |
| |) | <u>Oral Argument Requested</u> |
| |) | |

 CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 341(C)

Gary A Meadows, being of adult age and under no legal disability, upon his sworn oath, certifies as follows:

I certify that the Appellant's Reply Brief conforms to the requirements of Rules 341(a) and (b). The length of this Reply Brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h) (1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 7 pages.

FURTHER AFFIANT SAYETH NOT.

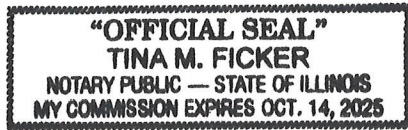

Gary A. Meadows

STATE OF ILLINOIS)

COUNTY OF MADISON)

SUBSCRIBED AND SWORN to before me on this 3rd day of March, 2022, by Gary A. Meadows, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

(SEAL)

Signature Tina M. Ficker

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) **No. 18-L-811**

) **Honorable David W. Dugan,
) Judge Presiding**
)
)

NOTICE OF FILING

Come Now Defendants-Appellants, Sandberg Phoenix & Von Gontard, P.C., John Gilbert, and Narcisa Symank and hereby give notice that the following filing was electronically submitted to the Supreme Court Clerk's office on this 3rd day of March, 2022:

1. Reply Brief of the Appellants, Sandberg Phoenix & Von Gontard, P.C., John Gilbert and Narcisa Symank
2. 341(c) Affidavit
3. Certificate of Service

The foregoing documents were electronically served via email on the following counsel of record on this 3rd day of March, 2022:

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PROOF OF SERVICE

The undersigned certifies that a complete copy of this instrument was electronically served via email to

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct

on this 3rd day of March, 2022.

/s/ Gary A. Meadows

No. 127327

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| NARCISA SYMANK, |) | |
| |) | Honorable David W. Dugan, |
| Defendants-Appellants. |) | Judge Presiding |
| |) | |
| |) | |

 CERTIFICATE OF SERVICE

Gary A. Meadows, the attorney representing the Defendants-Appellants, Sandberg Phoenix & Von Gontard, P.C., John Gilbert, and Narcisa Symank in the above-entitled cause, certifies that on this 3rd day of March, 2022, he caused to be electronically filed the following documents with the Clerk of the Illinois Supreme Court, 202 E. Capital Ave., Springfield, IL 62701.

- Reply Brief of the Appellants
- 341 C Affidavit
- Notice of Filing

And that he electronically served via email on this 3rd day of March, 2022, the Reply Brief of the Appellants and all other documents listed above to:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct

Dated this 3rd day of March, 2022.

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