No: 127327

IN THE SUPREME COURT OF ILLINOIS

MIDWEST SANITARY SERVICE, NANCY DONOVAN, and BOB EVANS, SR.,	Appeal from the Appellate Court of Illinois, Fifth District
Plaintiffs-Appellees,	No. 5-19-0360
vs.	Appeal from the Circuit Court of Madison County
SANDBERG, PHOENIX & VON GONTARD, P.C., JOHN GILBERT, and NARCISA SYMANK,	No. 18-L-811
Defendants-Appellants.	Honorable David W Dugan, Judge Presiding
	Oral Argument Requested

BRIEF OF THE APPELLEES, MIDWEST SANITARY SERVICE, NANCY DONOVAN AND BOB EVANS, SR.

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STATEMENT OF FACTS

The Legal Malpractice Case in the Trial Court

Midwest Sanitary Service, Inc., Nancy Donovan and Bob Evans Sr. filed a legal malpractice case against their defense lawyers, John Gilbert and Narcisa Symank and their law firm Sandberg, Phoenix & Von Gontard, P.C. alleging negligence in their representation in a retaliatory discharge and whistleblower lawsuit filed by a discharged former employee, Paul Crane.(C-001)

In Count I of the First Amended Complaint (C-026), Nancy Donovan, Bob Evans, Sr. and Midwest Sanitary Service, Inc. sued Defendants to recover the damages awarded to Crane to reimburse him for damages he suffered because of his dismissal from employment. The jury found for Crane and against Nancy Donovan, Bob Evans, Sr. and

Midwest Sanitary Service, Inc. jointly and severally, in the amount of $160,000 and awarded Paul Crane his attorney's fees which were later found by the trial court to be $225,000. These Plaintiffs further seek reimbursement of the attorneys' fees paid to these Defendants for defending them in the Crane case, $218,932.03. There are no issues in this appeal regarding Count I.

In Count II, which is at issue in this appeal, Midwest is seeking to recoup the amount awarded against it solely, $625,000.00 in punitive damages as well as the damages alleged in Count I.

Midwest alleged in both Counts that Defendants committed malpractice by reason of the following:

During a pretrial conference on October 7, 2015, according to the Plaintiff's Motion in Limine, Symank "indicated that she was aware that defendants had filed a limited 213(f) response and indicated an intent to file a revised/modified 213(f) response."

Failed to list all witnesses intended to be called at trial by supplementing Defendants' response to Supreme Court Rule 213 (f) interrogatories, resulting in 6 witnesses for defense being barred, including the individual who had reported that Crane was disparaging Midwest at a job site; the reason given at trial for firing Crane;

Failed to identify a voice mail recorded message from a Midwest customer as a lost or destroyed document in response to opposing

counsel's Request to Produce, resulting in a "missing evidence" instruction being given by the Court to the jury;

Failed to object to the language of a limiting instruction given by the Court regarding testimony of defense witnesses about the destroyed voicemail message, or to tender an alternative instruction, thereby forfeiting appellate argument regarding the instruction that was given;

Elicited testimony on cross-examination of Illinois Environmental Protection Agency Investigator Cahnovsky that he had referred Midwest to the Attorney General's office for prosecution and that the Attorney General's office had accepted the case;

While the case was pending in the appellate court, failed and refused to discuss potential settlement with opposing counsel, responding to counsel's invitation to discuss settlement by simply stating "No", without any discussion with, or even informing, his clients.

Plaintiffs further alleged that "But for one or more of the above negligent acts or omissions on the part of Gilbert and Symank and Sandberg, Phoenix & Von Gontard, P.C. the result of the trial would have been different, and a lesser or no amount would have been paid by Plaintiffs to satisfy the judgment and for legal fees paid to defendants.

The failure to inform these Plaintiffs of Crane's interest in settling the case and discussing it with their clients was also a breach of the Rules of Professional Responsibility and could have saved these Plaintiffs a considerable amount of money.

Defendants filed a series of Motions to Dismiss, the last, (C-036) ultimately resulting in the order appealed from (C-099).

ARGUMENT

I. Neither the Statutory Prohibition of the Recovery of Punitive Damages Against Lawyers nor the Public Policy of Illinois Bar Midwest from Recouping all the Damages Awarded by the Jury Resulting from Its Defense Attorneys' Negligence During the Trial of *Crane v Midwest*, Including Those Awarded as Punitive Damages.

A. 735 ILCS 5/2-1115 does not prohibit the damages sought by Midwest.

Midwest does not seek punitive damages from these Defendants. "...[I]t is generally recognized today that punitive damages are awarded primarily to punish the offender and to discourage other offenses. Restatement (Second) of Torts, sec. 908 (Tent. Draft No. 19, 1973); Prosser, Law of Torts 9 (4th ed. 1971)." *Mattyasovszky v. W. Towns Bus Co.*, 61 Ill. 2d 31, 35, 330 N.E.2d 509, 511 (1975).

Quite simply, Midwest seeks only to recover the loss it suffered due to the massive negligence of these defendants in their representation of Midwest in *Crane v. Midwest*. The Complaint does not seek any punitive damages from these defendants. It does not accuse Defendants of fraud, willful and wanton conduct or intentional conduct. The Complaint does not allege the Defendants should be punished nor does it allege there is a need to discourage others from so acting. Midwest does not allege that these Defendants benefited in any way from misconduct, although it is

alleged that Defendants did not earn the substantial fees they charged given the negligent representation provided.

Plaintiff Midwest merely seeks what it has lost: the actual and punitive damages awarded by the jury; Crane's attorneys fees which Midwest was required to reimburse Crane; and the attorney fees paid by Midwest to Defendants. There will be no "windfall" to Midwest as there would be if it requested and received a verdict for punitive damages against Defendants. Punitive damages are in addition to actual losses. No such award is sought.

Illinois Pattern Jury Instruction 35.01, Punitive/Exemplary Damages provides the best definition of what these damages are.

"In addition to compensatory damages, the law permits you under certain circumstances to award punitive damages. If you find that [(Defendant's name)] conduct was [fraudulent] [intentional] [willful and wanton] and proximately caused [injury] [damage] to the plaintiff, and if you believe that justice and the public good require it, you may award an amount of money which will punish [(Defendant's name)] and discourage [it/him/her] and others from similar conduct.

In arriving at your decision as to the amount of punitive damages, you should consider the following three questions. The first question is the most important to determine the amount of punitive damages:

1. How reprehensible was [(defendant's name)] conduct?

On this subject, you should consider the following:

a) The facts and circumstances of defendant's conduct;

b) The [financial] vulnerability of the plaintiff;

c) The duration of the misconduct;

d) The frequency of defendant's misconduct;

e) Whether the harm was physical as opposed to economic;

f) Whether defendant tried to conceal the misconduct;

g) [other]

2. What actual and potential harm did defendant's conduct cause to the plaintiff in this case?

3. What amount of money is necessary to punish defendant and discourage defendant and others from future wrongful conduct [in light of defendant's financial condition]?

[In assessing the amount of punitive damages, you may not consider defendant's similar conduct in jurisdictions where such conduct was lawful when it was committed.]

The amount of punitive damages must be reasonable [and in proportion to the actual and potential harm suffered by the plaintiff.]"

Defendants have not alleged that they have been informed that their malpractice insurance will not provide coverage for the damages sought as would be the case if punitive damages were sought as they are not covered by insurance. "...[P]ublic policy prohibits insurance against liability for punitive damages that arise out of one's own misconduct...."

Beaver v. Country Mut. Ins. Co., 95 Ill. App. 3d 1122, 1125, 51 Ill. Dec. 500, 503, 420 N.E.2d 1058, 1061 (1981).

Defendants would have this Court interpret 735 ILCS 5/2-1115 contrary to its plain language. It provides: "In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed." It does not say a lawyer does not have to reimburse his client for punitive damages awarded against the client resulting from the lawyer's negligence. Midwest does not seek an award of punative damages against Defendants, merely reimbursement for the amount of punitive damages awarded against Midwest resulting from Defendants' negligence. This Court "...must give effect to this statutory provision by giving its language its plain and ordinary meaning. *Hall v. Henn*, 208 Ill. 2d 325, 330, 802 N.E.2d 797, 280 Ill. Dec. 546 (2003)." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 256, 305 Ill. Dec. 584, 606, 856 N.E.2d 389, 411 (2006). Once Midwest paid the amount the jury awarded as punitive damages, they became merely damages to Midwest which now seeks reimbursement for those and other damages. It is money from Midwest's pocket like any other damage which, if caused by these Defendants' conduct, must be reimbursed by these Defendants. This Court "...cannot, "under the guise of statutory interpretation, *** 'correct' an apparent legislative oversight by rewriting a statute in a manner

inconsistent with its clear and unambiguous language." *People v. Pullen*, 192 Ill. 2d 36, 42, 733 N.E.2d 1235, 248 Ill. Dec. 237 (2000)." *People v. McClure*, 218 Ill. 2d 375, 388, 300 Ill. Dec. 50, 58, 843 N.E.2d 308, 316 (2006)

Tri-G, does not support Defendants' argument. There, Plaintiffs sought to hold their lawyers liable for failing to convince the jury to award punitive damages from the party the client sued. The Court held, and rightfully so, that the lawyer should not have to pay what the liable party would have had to pay for their wrongful conduct which would have been a windfall for the lawyer's client. The amount sought for lost punitive damages was in excess of the client's actual damages. Here, the amount sought was awarded to Crane and is the actual damage to Midwest. The windfall was to Crane.

The Supreme Court had several reasons for its decision in Tri-G, none of which were present here.

"...[I]mposing liability for lost punitive damages on the negligent attorney would neither punish the culpable tortfeasor nor deter that tortfeasor and others from committing similar wrongful acts in the future. Also, the amount of the award bears no relationship to the gravity of the negligent attorney's misconduct or the attorney's wealth." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 260, 305 Ill. Dec. 584, 608, 856 N.E.2d 389, 413 (2006).

While it is true, that Midwest is allegedly the culpable tortfeasor in this case, it is alleged that it is so only because the Defendants' negligently failed to defend Midwest. It is no different than holding an attorney liable for the wrongful criminal conviction of an innocent man. *Griffin v. Goldenhersh*, 323 Ill. App. 3d 398, 406, 257 Ill. Dec. 52, 60, 752 N.E.2d 1232, 1240 (2001). Here, at least, we have a limit on the recovery.

This is not a request to hold the lawyers liable for the misconduct of some third party. Here we seek to hold the Defendants liable for their errors leading to Midwest, their client, being held accountable for conduct for which they were not liable or for which they were not liable to the extent found by the jury.

B. Midwest need not allege complete innocence to recover.

Defendants make the claim that the Amended Complaint would allow the jury a "roving commission" to determine whether to award some or all of the amount found in the underlying case as punitive damages. The Amended Complaint contains the following allegation:

"14. But for one or more of the above negligent acts or omissions on the part of Gilbert and Symank and Sandberg, Phoenix & Von Gontard, P.C. the result of the trial would have been different, and a lesser or no amount would have been paid by Plaintiffs to satisfy the judgment and for legal fees paid to defendants."

Defendants would have the Court rule that it is all or nothing in a legal malpractice case. That, however, is not true. That is not the standard for either proximate cause or damages.

The Illinois Appellate Court in *Nelson v. Quarles & Brady, LLP*, 2013 IL App (1st) 123122, ¶ 72, 997 N.E.2d 872 explained:

> "In *Georgou v. Fritzshall*, No. 93 C 997, 1995 U.S. Dist. LEXIS 5540, 1995 WL 248002 (N.D. Ill. Apr. 26, 1995), decided under Illinois law, the court stated:
> '[A] malpractice plaintiff is not required to demonstrate what award the *original judge* or jury would have made if no malpractice had occurred. Once a malpractice plaintiff has demonstrated that his attorney fell below a reasonable standard of professional conduct, the factfinder must determine what a *reasonable judge* or jury would have concluded and compare that conclusion to the actual resolution of the underlying action to determine damages.' (Emphasis added.) 1995 U.S. Dist. LEXIS 5540, [WL] at *5."

Stated in another way, the Seventh Circuit, applying Illinois law held that "A plaintiff in a legal malpractice suit is not required to prove to a certainty that he would have won (or lost less) had it not been for the negligence of its lawyer, but he must show that a victory of some sort, even if just partial, was more likely than not." *Praxair, Inc. v. Hinshaw & Culbertson*, 235 F.3d 1028, 1032 (7th Cir. 2000).

A jury may decide that no damages were justified; actual damages were proven, but not punitive damages; or that the punitive damages awarded were excessive after considering the Defendants' negligence. A jury would not be "speculating", they would be doing what they were intended to do.

C. Other States Have Understood that Recovery of Punative Damages Awarded to Clients of Negligent Lawyers Is the Recovery of Compensatory Damages

Seven states and the District of Columbia have considered this issue. They have understood the compensatory nature of client's recovering the amounts they paid in punative damages from the lawyers whose negligence caused the award of punative damages.

In *Haberer v. Rice* , 511 N.W.2d 279, 288 (S.D. 1994) The South Dakota Supreme Court explained that "An attorney is liable for all damages proximately caused by the wrongful act or omission. *Taylor Oil Co. v. Weisensee, supra; Dessel v. Dessel*, 431 N.W.2d 359 (Iowa 1988); *Mallen & Smith, supra,* § 16.4. Compensatory damages for negligence are those which flow directly and proximately from a defendant's breach of his duty to plaintiff. *Scognamillo v. Olsen*, 795 P.2d 1357, 1361 (Colo.App. 1990). If the defendant attorney's negligence results in entry of a judgment when there otherwise would not have been judgment, the proper measure of damages is the entirety of the prior judgment regardless of the theory upon which the prior judgment was entered or the nature of the damages assessed thereunder. *Id.; Hunt v. Dresie*, 241 Kan. 647, 740 P.2d 1046 (Kan.1987).

Thus, the punitive damages assessed in the underlying case are part and parcel of the damages plaintiffs suffered as a result of the defendant's alleged negligence. *Scognamillo, supra,* at 1361."

Needless to say, the cases cited by the Colorado Court approve of the recovery by the clients as well. *Scognamillo v. Olsen* , 795 P.2d 1357, 1361 (Colo. App. 1990); and the Kansas Supreme Court explained its reasoning thus. "The trial court has failed to see a crucial distinction between the cases and authorities it cited and Hunt's suit against his former attorneys. The damages Hunt had to pay under the Sampson judgment included damages called punitive damages from the vantage point of that lawsuit. From the vantage point of this lawsuit, should Hunt be successful, all the damages are simply those which proximately resulted from his attorneys' negligence; they are no longer properly called punitive damages. If they were called punitive damages and the trial court's decision properly denied their recovery, then any attorney representing a client who might be assessed punitive damages in a lawsuit could rest easy, secure in the knowledge that any improper handling of the suit, even intentional actions, could not subject the attorney to any malpractice liability at all." *Hunt v. Dresie*, 241 Kan. 647, 661, 740 P.2d 1046, 1057 (1987). It is the duty of any defense lawyer when her client is faced with the possibility of punative damages to advise her client of the reasonable probability of the judge or jury awarding such damages and when the Plaintiff offers to discuss settlement after a punative damage verdict, telling the client and exploring the possibility of settling the case without punative damages or reducing them. These defendants did neither, consistently advising these

Plaintiffs that they would win in the appellate courts and continuing to collect their fees. Clients see punative damages as just more money they have to pay resulting from their lawyers' negligence. This Court should too.

Other states are also supportive: *Elliott v. Videan* , 164 Ariz. 113, 119-20, 791 P.2d 639, 645-46 (Ct. App. 1989); *Herendeen v. Mandelbaum* , 232 So. 3d 487, 493 (Fla. Dist. Ct. App. 2017); *Jacobsen v. Oliver* , 201 F. Supp. 2d 93, 100-102 (D.D.C. 2002); *Picadilly, Inc. v. Raikos* , 555 N.E.2d 167, 169 (Ind. Ct. App. 1990), *rev'd on other grounds*, 582 N.E.2d 338(Ind., 1991); *Patterson & Wallace v. Frazer*, 93 S.W. 146 (Tex. Civ. App. 1906), *rev'd on other grounds*, 100 Tex. 103, 94 S.W. 324 (1906).

Amicus' reference to Comment *h* to Section 53 of the Restatement (Third) of the Law Governing Lawyers (2000) is not helpful. It says nothing about the issue before the Court: recovery of punative damages awarded in the underlying case by a malpractice Plaintiff. The entire focus seems to be the damages recoverable by a losing Plaintiff and mostly about punative damages against a lawyer for malpractice. Malpractice of defense counsel must be implied.

D. There is No "Vast Social Cost" Associated With Upholding the Trial Court's Decision.

The Defendants and Illinois Defense Counsel would have this Court believe that upholding the Trial Court's decision would expose

defense lawyers to unlimited liability. Defense lawyers who represent their clients competently have nothing to fear. Defendants cite *Tri-G* at 266 in support of this otherwise unsupported claim and the further claim that to uphold the Trial Court's decision in this case will lead to "increased professional liability insurance premiums or denials of coverage". The problem with that assertion is that it was not the Supreme Court's conclusion but the Defendant Burke's argument.

There is also no evidence or cited authority that upholding the ability of a legal malpractice plaintiff to recover for punitive damages awarded against them due to their defense lawyer's negligence would "preclude or deter many lawyers from undertaking representation of defendants in controversial cases and make it more difficult for consumers to obtain legal services", nor was that a holding of the *Tri-G* Court. It was quoted from a case cited by the Appellate Court below, quoting from a California case, *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP*, 30 Cal. 4th 1037, 69 P.3d 965, 135 Cal.Rptr.2d 46 (2003), *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 259 (Ill. June 22, 2006). The reference to "hostile venues where the risks of unrestrained punitive verdicts are becoming more common" is defense counsel's own musing, supported by nothing.

It is interesting that Amicus, Illinois Defense Counsel, cite *Doe vs. Parrillo*, 2021 IL 126577 as illustrative of the "exposure" that defense counsel fears. A more despicable potential malpractice plaintiff would be

hard to imagine. If the facts of this case, *Doe* at ¶4, became known to the malpractice jury, which they would, a jury would make quick work of Mr. Parrillo's claim of malpractice. A jury would conclude that the verdict in the Doe case was richly deserved by Mr. Parrillo and find for the lawyers in short order.

CONCLUSION

Neither Illinois public policy on punitive damages nor the statutory prohibition on punitive damages found in 735 ILCS 5/2-1115 bar recovery of incurred punitive damages in a legal malpractice case where the client alleges that, but for the negligence of the attorney in the underlying case, the jury in the underlying case would have returned a verdict awarding either no punitive damages or punitive damages in a lesser sum.

Allowing such damages does not allow juries or judges to speculate but allows the factfinder to determine what a reasonable judge or jury would have concluded and compare that conclusion to the actual resolution of the underlying action to determine damages.

Punitive damages are the actual damages to the defendant when they are the consequence of the negligent acts or omissions of the defendant's lawyer and, as such, should be recoverable, in whole or in part.

There is no evidence that there is any societal cost to allowing defendants to recover their actual loss occasioned by the negligence of their defense attorneys.

This Court should answer the certified question as above and grant such other relief as may be just.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to the requirements of Rule 341(a) and (b). The length of this Brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and 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 16 pages.

/s/ George R Ripplinger

PROOF OF SERVICE

The undersigned certifies that on the 26th day of January, 2022, he caused the foregoing Appellees' Brief to be electronically filed with the Supreme Court of Illinois by using Odyssey EfileIL system, and a copy of the Appellees' Brief to be served electronically by the Odyssey E-Filing System upon counsels for the defendant gam@heplerbroom.com and tjm@heplerbroom.com.

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.

/s/ George R Ripplinger