No. 127327

IN THE SUPREME COURT OF ILLINOIS
FROM THE APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT
No. 5-19-0360

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

Defendants-Appellants-Petitioners,

vs.

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

Plaintiffs-Appellees-Respondents,

On appeal from the Circuit Court of Madison County, Illinois,
No. 18 L 811
The Honorable David W. Dugan, Judge Presiding

ILLINOIS DEFENSE COUNSEL'S *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS-PETITIONERS

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11/30/2021 12:45 PM
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Statement of Interest of *Amicus Curiae*

The Illinois Defense Counsel (IDC) is made up of about 600 Illinois attorneys who devote a substantial portion of their practice to the representation of business, corporate, insurance, professional, governmental, and other individual defendants in civil litigation. For more than 50 years, it has been the mission of the IDC to ensure civil justice with integrity, civility, and professional competence.

The IDC has a substantial interest in maintaining the continuity, uniformity and predictability of Illinois law. The IDC respectfully submits that this Court should employ the reasoning of its decision in *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill.2d 218 (2006) and thereby apply the same interpretation of 735 ILCS 5/2-1115 to protect civil defense lawyers from the assessment of punitive damages that it previously has used to shield plaintiffs' lawyers. This will promote uniformity in the law for all lawyers no matter who they represent. Moreover, the decision in this case will directly affect the interests of IDC members who, if the lower courts' decisions are affirmed, will be subject to punitive damages for alleged mere negligence.

The IDC's role as a representative of the defense bar in Illinois makes it uniquely situated to assist the court in addressing the importance of preserving consistency in the application of the law to all lawyers.

Argument

The decision of the circuit court and Illinois Appellate Court, Fifth District cannot stand in the face of the policy judgment of the Illinois General Assembly in 735 ILCS 5/2-1115 to shield all lawyers from punitive damages and the decision of this Court in *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill.2d 218 (2006), holding that unrecovered punitive damages in an underlying matter cannot be sought against an allegedly negligent plaintiffs' attorney. To hold otherwise and affirm the judgment of the lower courts would create two classes of lawyers in this state, one group that is subject to punitive damages and one that is not. It would also subject defense lawyers to punitive damages for claims of mere negligence when, under Section 2-1115, grossly negligent, willful and wanton, and even intentional conduct by a lawyer cannot subject any Illinois lawyer to the recovery of punitive damages. The logical incongruity of such a holding is untenable and requires reversal.

To reach the conclusion that the lower courts should be reversed, this Court should be guided by its own precedent, the applicable statute, and the following rationale: 1) the purpose of punitive damages is to punish reprehensible conduct and deter others from such conduct, 2) the policy of this state does not allow for insurability for punitive damages, and 3) the decisions of other states (none of whom have a statute similar to Section 2-1115) to not allow recovery of punitive damages against lawyers in a subsequent legal malpractice action.

This Court's recent decision in *Doe v. Parillo*, 2021 IL 126577 is illustrative of the punitive exposure that defense lawyers will face if the lower courts' decisions are not reversed. In *Doe*, this Court stated "[w]e have no hesitation in concluding that Parrillo's conduct was egregiously reprehensible." *Doe*, 2021 IL 126577, ¶ 53. Despite the finding of such reprehensible conduct, if this Court does not reverse, it is entirely conceivable that Parrillo would bring (if he has not already) a legal malpractice action against the lawyers who represented him at the trial level in order to seek recovery from those lawyers for the punitive damages that were assessed against him for Parrillo's batteries and sexual assault of Doe.

While Muth's and Holstein's conduct at the *Doe* trial might be claimed by Parrillo to have been negligent, seeking recovery from his lawyers would essentially place Muth and Holstein in the position of insuring Parrillo for his own "egregiously reprehensible" conduct. This would be contrary to this Court's holding that that insurance for punitive damages is violative of public policy. *Bernier v. Burris*, 113 Ill.2d 219, 246 (1986), citing *Beaver v. County Mutual Ins. Co.*, 95 Ill. App. 3d 1222. 1124-26 (5th Dist. 1981) ("[w]e think the better view, and one which consists with the function and nature of punitive damages in Illinois, is that which prohibits insurance under such circumstances.")

Further, if this Court were to affirm the judgment of the lower courts, the exposure of defense lawyers to punitive damages would make it

difficult for defendants to obtain counsel willing to take on the most difficult cases for fear of liability for punitive damages. In addition, to the extent that punitive damages assessed as damages against a defense lawyer were covered by a policy of professional liability insurance (a debatable proposition), that would raise insurance premiums for defense counsel substantially and, contrary to Illinois' public policy, indirectly insure the conduct of the underlying defendant that led to the assessment of punitive damages in the first instance.

As a consequence, whether punitive damages assessed against a defendant and then sought as damages against a lawyer are insurable by a lawyer's professional liability policy or not, the twin goals of punitive damages to punish and deter the conduct of the wrongdoer would be entirely defeated if the award of punitive damages against an underlying defendant can simply be foisted onto a lawyer whose negligence allegedly caused the underlying defendant to be assessed punitive damages.

For these, and a variety of reasons, courts of other states, none whom seem to have a statute similar to Section 2-1115, have held that punitive damages cannot be sought against a lawyer. In *Paul v. Smith, Gambrell & Russell*, 599 S.E.2d 206, 211 (2004), a case similar to this one where punitive damages assessed against an underlying defendant were sought against former defense counsel, the court stated "to allow the plaintiffs to shift their tort liability for punitive damages that the plaintiffs were specifically found by clear and convincing evidence to have caused

intentionally would be contrary to the public policy of Georgia, even if former counsel were found liable for legal malpractice in the action in which punitive damages were awarded."

Similar to this Court's decision in *Tri-G*, in *Piscitelli v. Friedenber*g, 87 Cal. App. 4th 953, 979 (4th Dist. 2001), the court held that public policy prohibited awarding a client "lost punitive damages" as compensatory damages in a malpractice case in which the jury found an attorney was solely negligent. The *Piscitelli* court said that it could not, as a matter of policy, justify imposing an award intended to punish a wrongful actor on a defendant who did not act oppressively, maliciously, or fraudulently. This would punish an innocent actor for another's oppressive, malicious, or fraudulent wrongdoing. *Piscitelli*, 87 Cal. App. 4th at 981. The court held, further, that it could not justify re-characterizing an award intended to punish into one intended to compensate under the theory that the legal malpractice defendant "proximately caused" the loss of the plaintiff's punitive damages claim. *Id.* at 982. That argument was based on the premise that the attorney's negligence was the legal or "proximate" cause of the jury's failure to award the plaintiff punitive damages. *Id.* While the defendant's negligence may have been the cause in fact of the plaintiff's lost claims, the court concluded, it could not conclude that his negligence proximately caused the loss of punitive damages that might have been recovered from a third party. *Id.* at 983.

Similar conclusions were reached in *Cappetta v. Lippman*, 913 F.

Supp. 302 (S.D. N.Y. 1996) (applying New York law) and *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012). Moreover, of the courts that have allowed the recovery of punitive damages against a lawyer acting as either counsel for the defense or counsel for the plaintiff in an underlying matter, none have come to those conclusions with a statute like Section 2-1115.

Accordingly, the weight of authority is in favor of reversal, including the reasoning of the cases from New York and California adopted by this Court in *Tri-G*, *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal. 4th 1037 (2003) and *Summerville v. Lipsig*, 270 A.D.2d 213 (2000), and Comment *h* to Section 53 of the Restatement (Third) of the Law Governing Lawyers (2000).

Conclusion

Failure to reverse the lower courts' decisions would not only be logically incongruent by imposing liability for punitive damages on a merely negligent defendant civil defense lawyer, but would also be contrary to the prior decisions of this court in *Tri-G*, *Doe*, and *Bernier* as well as the policy of the General Assembly announced in Section 2-1115 against imposing punitive damages on lawyers.

For all of these reasons and those stated in Sandberg Phoenix's Brief of Appellant, the judgment of the appellate court should be reversed.

Respectfully submitted,

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Supreme Court Rule 341(c) Certificate of Compliance

I certify that this reply brief conforms to the requirements of Rules 341(a) an (b). The length of this brief, excluding the 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 notice of filing and proof of service, and those matters to be appended to the brief under Rule 342(a), is 8 pages.

Respectfully submitted:

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PLEASE TAKE NOTICE that the Illinois Defense Counsel filed its Proposed *Amicus Curiae* Brief in Support of Defendants in the above matter was electronically submitted to the Clerk of the Supreme Court on November 23, 2021, via the court's e-filing system and Odyssey File and Serve. A copy of said document is attached.

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CERTIFICATE OF SERVICE

Donald Patrick Eckler, an attorney, certifies that he served the foregoing Illinois Defense Counsel filed its Motion for Leave to File its *Amicus Curiae* Brief in Support of Defendants on the above-named attorney(s) at the above addresses on November 23, 2021, via the court's e-filing system and Odyssey File and Serve. Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies the statements set forth in this instrument are true and correct.

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