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

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ORAL ARGUMENT REQUESTED

E-FILED
11/23/2021 9:47 AM
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and
STATEMENTS OF POINTS AND AUTHORITIES

THE NATURE OF THE ACTION AND THE JUDGMENT APPEALED FROM

Plaintiff/Appellee, Midwest Sanitary Service, Inc. ("Midwest"), brought this action for legal malpractice against the Defendants/Appellants, Sandberg Phoenix & von Gontard, P.C., John Gilbert, and Narcisa Symank, seeking to recover some and all of the punitive damages that were awarded against Midwest by the jury in the underlying lawsuit. The underlying lawsuit against Midwest was filed by Paul Crane ("Crane"), who successfully argued that he was illegally fired by his employer, Midwest, because he reported Midwest's environmental violations to the Illinois Environmental Protection Agency ("IEPA").

735 ILCS 5/2-1115 expressly prohibits the recovery of punitive damages in legal malpractice cases ("In all cases . . . in which the plaintiff seeks damages by reason of legal . . . malpractice, no punitive . . . damages shall be allowed."). The Defendants therefore filed a Motion to Dismiss and Strike Midwest's claim for those punitive damages. The Circuit Court ultimately denied that Motion to Dismiss, finding that 735 ILCS 5/2-1115 did not apply because the punitive damages that had been paid by Midwest "are not punitive in nature but are, instead, compensatory in nature" and could be sought against the attorney Defendants. (C. 74) The Circuit Court recognized that this issue is one on which "reasonable minds can certainly disagree" and found that the issue should be "answered by those of a higher calling." (C. 74) The Circuit Court therefore certified the Rule 308 question presented below:

Does Illinois' public policy on punitive damages and/or 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? (C. 99)

The attorney Defendants thereafter filed an Application for Leave to Appeal Pursuant to Supreme Court Rule 308, and that Application was accepted by the Appellate Court on February 20, 2020. The Appellate Court ultimately answered the certified question in the negative, finding that neither the statutory prohibition on punitive damages, nor public policy barred Midwest from recovering some or all of the punitive damages lost by Midwest. (A-8) Indeed, the Appellate court essentially adopted the Circuit Court's analysis in whole when it concluded that those punitive damages were no longer punitive. (A-8)

The Appellate Court's Opinion is erroneous however. The Opinion conflicts with this Court's holding in *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill.2d 218, 856 N.E.2d 389 (2006). In *Tri-G*, this Court specifically held that 735 ILCS 5/2-1115 barred a legal malpractice plaintiff from recovering its lost punitive damages from its attorney. *Id.* The Opinion is also contrary to Illinois' public policy as set forth in *Beaver v. Country Mutual Insurance*, 95 Ill.App.3d 1122, 420 N.E.2d 1058 (5th Dist. 1981), that punitive damages for one's own misconduct may not be shifted to another. That is particularly true in this case, given Midwest's allegation that but for the alleged legal malpractice, "*a lesser* or no amount [in punitive damages] would have been paid by Plaintiff to satisfy the judgment . . .," and Midwest's insistence that it is nevertheless entitled to recover *some of* the punitive damages even if its conduct was unlawful. (C-33; A-18) (emphasis added).

In short, the Appellate Court's Opinion is erroneous and should be reversed to comply with 735 ILCS 5/2-1115 and to comport with Illinois' public policy on punitive damages.

ISSUE PRESENTED FOR REVIEW

The Rule 308 issue that was certified and is now before the Court is as follows:

> **Does Illinois' public policy on punitive damages and/or 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?**

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rule 308. The Circuit Court, Third Judicial Circuit, Madison County, certified a question of law on August 9, 2019, pursuant to Supreme Court Rule 308, and the Defendants timely filed their Application for Leave to Appeal on August 23, 2019. The Application for Leave to Appeal was allowed by the Appellate Court on February 20, 2020, and the Appellate Court issued its Opinion on April 28, 2021. The Defendants timely filed their Petition for Leave to Appeal on June 2, 2021. This Court allowed review and has jurisdiction pursuant to Rule 315.

STATUTE INVOLVED

"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."

735 ILCS 5/2-1115

STATEMENT OF FACTS

A. The Underlying Retaliatory Discharge Case

Midwest Sanitary Service, Inc. ("Midwest") is in the business of hauling hazardous waste and other waste materials. (C-81) Midwest hired Paul Crane ("Crane") in 1983 as a truck driver, and he was promoted to be the supervisor of the container shop after 2005. (C-81-82) Midwest used the containers in the container shop to transport waste and hazardous waste.

In September of 2013, Midwest was very busy with a project referred to as the "Chouteau job." (C-82) Because Midwest was short on drivers, it required Crane to regularly drive a truck rather than simply supervise the container shop. (C-82) Midwest knew that Crane was unhappy about being required to drive a truck again. (C-82) On October 7, 2013, Crane made an anonymous call to the Illinois Environmental Protection Agency ("IEPA"), reporting that he was a current employee of Midwest and that he had concerns about the storage of flammable materials in Midwest's container shop. Crane spoke to the IEPA administrator six or seven times regarding his concerns about various of Midwest's environmental practices, including in the container shop. (C-82) The IEPA administrator conducted an unannounced inspection at Midwest on October 8, 2013, told Midwest there had been a complaint, and found a number of violations. (C-82) The IEPA administrator later returned on October 31, 2013 for a follow up inspection and determined that while some of Midwest's environmental violations had been remedied, others still remained. (C-82)

Midwest acknowledged that Crane had previously complained to its management about the improper disposal of the waste and hazardous waste that remained in the

containers when those containers were returned to Midwest. (C-83-84) Indeed, some of the environmental violations found by the IEPA were the very same concerns that Crane had already directly complained about to Midwest. (C-84) One of Midwest's owners, Allen Evans, admitted that he suspected it was Crane who had reported Midwest to the IEPA. (C-84) Likewise, owner Nancy Donovan and manager Bob Evans, Sr. were both involved in firing Crane, and each acknowledged that no other employee had complained to them about environmental concerns. (C-84)

On the morning of November 18, 2013, Midwest received a certified letter from the IEPA detailing its findings that Midwest had committed 14 violations of environmental laws, regulations, or permits. (C-82) Approximately three hours later, the management of Midwest then called Crane into the office and terminated his employment of thirty years. (C-82) The final paycheck that was issued to Crane four days later, on November 22, 2013, included the note, "[t]hink before you speak. Words can get you into trouble much easier than they can get you out of it." (C-84)

At trial, Midwest denied that it fired Crane because he reported its environmental violations to the IEPA. Rather, Midwest claimed that it fired Crane because the on-site supervisor at the Chouteau job left a voicemail message with Midwest in late October or early November that Crane had complained on the job site about Midwest and one of its managers, Bob Evans, Jr. (C-83) Specifically, Allen Evans testified that he spoke about this voicemail with Crane on November 4, 2013 and reportedly "wrote [him] up" that same day. (C-83) Midwest claimed at trial that it then fired Crane two weeks later because of that voicemail, but that it did not fire Crane because it had received the certified letter from IEPA charging it with 14 environmental violations only three hours earlier. Midwest also

claimed that the message it included in Crane's final paycheck to "[t]hink before you speak," was intended to be an "inspirational note" or a "life lesson," and it often included such messages with employee paychecks. (C-84)

After hearing the above evidence, the jury found against Midwest, ordering it to pay Crane $160,000 in compensatory damages and $625,000 in punitive damages. That verdict was subsequently affirmed on appeal. (C-81-94)

B. The Instant Legal Malpractice Case

After the underlying case concluded, Midwest filed a legal malpractice claim against their defense attorneys, Sandberg Phoenix & von Gontard, John Gilbert, and Narcisa Symank (hereafter referred to collectively as "Defendants" or the "attorney Defendants"). (C-1-5) Specifically, Midwest alleged, among other things, that the Defendants failed to properly disclose various Rule 213(f) witnesses (including the onsite supervisor at the Chouteau job who reportedly called Midwest to complain about Crane) and failed to state in written discovery that Midwest had deleted the supervisor's voicemail before it received a litigation hold letter from Crane's counsel and before the suit was ever filed. (C-2) As discussed more fully in the Appellate Court's Rule 23 Order in the underlying case, the testimony of the undisclosed witnesses was barred, and the jury received a missing evidence instruction with respect to the deleted voicemail message. (C-81-94) Ultimately, Midwest alleged in Count II of the instant malpractice case that "but for . . . the above negligent acts . . ., the result of the trial would have been different, and a lesser or no amount [in punitive damages] would have been paid by [Midwest] to satisfy the judgment." (C-33; A-18)

The attorney Defendants thereafter filed a series of Motions to Dismiss and Strike, arguing that Midwest's allegation that "the result of the trial would have been different, and a lesser or no amount would have been paid," was insufficient. Midwest was instead required to prove that it would have prevailed on the claims made by its employee absent the alleged malpractice. *Governmental Interinsurance Exchange v. Judge*, 221 Ill.2d 195, 200, 850 N.E.2d 183 (2006) The Defendants also argued that Midwest was improperly trying to recoup some or all of its punitive damages from its attorneys, which is not permitted under Illinois law. (C-36-40) Specifically, Defendants argued that the Illinois Supreme Court has found that 735 ILCS 5/2-1115 "expressly bars recovery of punitive damages in a legal malpractice action." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill.2d 218, 267, 856 N.E.2d 389 (2006).

The Circuit Court ultimately denied Defendants' Motion to Dismiss on June 3, 2019. While it agreed that "no malpractice exists unless the plaintiff proves that . . . [it] would have been successful in the underlying action," the Circuit Court nevertheless found that it was sufficient for Midwest to instead allege only that the result of the trial would have been different with a verdict that was lesser or none. (C-66-67; A-23) Moreover, it found that the punitive damages that had been paid by Midwest were not barred by 735 ILCS 5/2-1115, because they were no longer punitive damages but were instead compensatory damages that could be sought against the attorney Defendants. (C-64-74; A-31) The Circuit Court acknowledged that the issue of punitive damages presented is one on which "reasonable minds can certainly disagree" and therefore certified the following issue for appeal:

Does Illinois' public policy on punitive damages and/or 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? (C-99)

The attorney Defendants timely filed their Application for Leave to Appeal the Certified Issue with the Appellate Court, but that Application was denied. (A-4) The attorney Defendants thereafter filed a Motion for Supervisory Order with this Court, and this Court directed the Appellate Court to allow the Defendants' Application for Leave to Appeal. (A-4) The Fifth District Court of Appeals subsequently allowed the Application for Leave to Appeal and ultimately issued its Opinion on April 28, 2021. (A-1)

In answering the certified question in the negative, the Appellate Court found that neither the statutory prohibition on recovery of punitive damages in legal malpractice cases, nor public policy barred the recovery of some or all of the punitive damages incurred by Midwest in the underlying case. (A-8) In what appears to be a blanket adoption of the Circuit Court's analysis and reasoning, the Appellate Court concluded that these punitive damages were no longer punitive. (A-8)

ARGUMENT

I. Standard of Review

This appeal is brought pursuant to Illinois Supreme Court Rule 308 and involves a question of law regarding the construction of 735 ILCS 5/2-1115. This Court must therefore apply a *de novo* standard of review. *Rogers v. IMERI*, 999 N.E.2d 340, 343, 376 Ill.Dec. 457 (2013) ("[b]ecause an interlocutory appeal under Rule 308(a) necessarily involves a question of law, our standard of review is *de novo*.")

II. The Statutory Prohibition on the Recovery of Punitive Damages in Legal Malpractice Case as well as Public Policy of Illinois Bars Midwest from Attempting to Recoup its Punitive Damages from its Attorneys.

The Appellate Court erred in both its analysis and its holding that the claim for punitive damages should be allowed to stand. First, the Appellate Court really did not address the prohibition on punitive damages in 735 ILCS 5/2-1115 or the public policies underlying that legislative enactment. Second, the Appellate Court did not explain or address how the public policies behind the imposition of punitive damages are served by allowing a client to pursue the recovery of some of its punitive damages even if that client is again found guilty of wrongdoing in the legal malpractice case. Further, the Appellate Court completely ignored the societal cost in the rule that would now expose civil defense attorneys to unlimited liability for punitive damages. As discussed more fully below, the Opinion of the Appellate Court should therefore be reversed.

A. 735 ILCS 5/2-1115 Prohibits the Recovery of the Punitive Damages Sought by Midwest.

Section 2-1115 of the Illinois Code of Civil Procedure was enacted in 1985, and it 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.

735 ILCS 5/2-1115. The purpose behind the statute is gleaned from its plain language: to protect all attorneys in the legal marketplace from the risk of exposure to the unlimited liability associated with unrestrained punitive damages. In placing such a limitation on damages, the legislature sought to make it easier for the public to obtain more affordable legal services. This Court examined Section 2-115 in *Tri-G, Inc. v. Burke, Bosselman & Weaver* and concluded that the statute barred a client from recovering lost punitive damages from its attorney in a subsequent legal malpractice case. 222 Ill.2d 218, 268 (2006) (because "the General Assembly has determined that lawyers cannot be compelled to pay punitive damages based on their own misconduct, . . . it would be completely nonsensical to hold that they can nevertheless be compelled to pay punitive damages attributable to the misconduct of others."). Such a holding is indeed consistent with the purpose of the statute in limiting the exposure of all attorneys in Illinois. Moreover, since the decision in *Tri-G*, the General Assembly has not taken any steps to amend or revise 735 ILCS 5/2-1115. Such legislative inaction creates a presumption that the legislature has acquiesced in the Court's construction of the statute. *See Miller v. Lockett*, 98 Ill.2d 478, 483, 457 N.E.2d 14 (1983). In short, the statute on its face fully protects all attorneys in

legal malpractice cases from exposure to punitive damages, whether being sought directly or indirectly as a result of punitive damages paid or lost in the underlying case.

The jury in the underlying case found that Midwest illegally fired its long-time employee, Paul Crane, because he reported Midwest's environmental violations to the IEPA. The jury therefore awarded Crane compensatory damages as well as $625,000 in punitive damages. Midwest now sues the Defendants for legal malpractice to recover some or all of those punitive damages. This triggers the application of 735 ILCS 5/2-1115, which expressly prohibits the recovery of any such punitive damages. *See Tri-G*, 222 Ill.2d 218 at 256 (language of a statute must be given "its plain and ordinary meaning").

Notwithstanding Section 2-1115's clear applicability, however, the Appellate Court essentially relegates the statute to a footnote in its Opinion, with no further discussion of the statutory language or consideration of the public policies behind this legislative enactment. The Appellate Court's Opinion also fails to address the need recognized by the General Assembly to protect attorneys from unlimited exposure to punitive damages in order to keep legal services readily available and affordable. Nor does the opinion explain why 735 ILCS 5/2-1115 should fully protect all plaintiff's attorneys from exposure to lost punitive damages but should not be available to protect defense attorneys from potential liability for such punitive damages.

Instead, the Appellate Court's Opinion simply adopts the Circuit Court's conclusion that the punitive damages being sought are no longer punitive but are instead compensatory damages designed to make the Plaintiff whole. (A-8) While this conclusion may be appealing at first glance, it does not do justice to the language and purpose of the statute or to the public policy behind the imposition of punitive damages. Indeed, there are

many circumstances in our legal system where the legislature or policy in Illinois dictates that plaintiffs are not to be made whole. *See, e.g.*, *Chapman & Associates, Ltd. v. Kitzman*, 193 Ill.2d 560, 572, 739 N.E.2d 1263 (2000) (absent statutory authority or a contractual agreement, each party is responsible for its own attorney fees and costs); 235 ILCS 5/6-21 (imposes dollar limits on what plaintiffs can recover in dram shop actions); 705 ILCS 505/8(c) (imposes dollar limits on what a person who is unjustly imprisoned may be able to recover in damages); 705 ILCS 505/8(d) (imposes dollar limits on what a plaintiff may recover in tort against the State or a State University); 745 ILCS 10/5-106 (plaintiffs may not recover damages from public entities and employees for their negligent operation of a vehicle when responding to an emergency call); 735 ILCS 5/13-214.3(c) (client's cause of action for legal malpractice may not proceed if it is filed more than six years after the date on which the act or omission occurred); *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155, 585 N.E.2d 155 (1991) (employer may not be liable for any amount greater than its statutory liability under the Workers Compensation Act). Simply put, while one premise of tort law is generally to make Plaintiffs whole, the General Assembly specifically limited that in legal malpractice cases. It enacted 735 ILCS 5/2-1115 to protect all attorneys from the dangers of unrestrained punitive damages and to help maintain the availability of affordable legal services.

In short, the statutory prohibition on punitive damages in legal malpractice cases speaks for itself, and Midwest's claim for punitive damages should have been dismissed or stricken. The Appellate Court erred in answering the Certified Question in the negative, and such decision should be reversed as the statutory prohibition on punitive damages

found in 735 ILCS 5/2-1115 bars the recovery of incurred punitive damages in a legal malpractice case.

B. Because punitive damages are designed to punish the culpable tortfeasor and deter that tortfeasor and others from committing such wrongful acts, it violates the public policy of Illinois to allow Midwest to claim a right to recover some or all of its punitive damages from its attorneys.

Even if the General Assembly had not enacted a statutory prohibition on the recovery of all punitive damages in legal malpractice cases, it would nevertheless be improper to allow the recovery of such punitive damages unless Midwest successfully 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 any 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. *See Tri-G, Inc.*, 222 Ill.2d at 260; *Beaver v. Country Mutual Ins. Co.*, 95 Ill. App. 3d at 1124 (because punitive damages are awarded for punishment and deterrence, it would be improper to shift them away from the actual wrongdoer).

Notwithstanding the public policy above, Midwest argues that a jury in this case should be free to award Midwest some or all of the punitive damages being sought even if Midwest did behave unlawfully toward Mr. Crane. But for Midwest to recover damages for legal malpractice against its attorneys, it is required to prove that it would have prevailed and/or that its defense would have been successful. *See 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"); *Brummel v. Grossman*, 2018 Ill.App. 170516 (2018) (the plaintiff

must "establish that 'but for' the negligence of the attorney, the client would have succeeded in the underlying suit"); *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill. App. 3d 784, 788, 767 N.E.2d 470 (2002) (the plaintiff must plead and prove "sufficient facts to demonstrate that 'but for' defendants' alleged negligence, [it] would have prevailed in the underlying litigation."); *Bartholemew v. Crockett*, 131 Ill. App. 3d 456, 465, 475 N.E.2d 1035 (1985) (Plaintiff must prove that but for the attorney's negligence, the client would have successfully defended the underlying suit); *West Bend Mutual Ins. Co. v. Schumacher*, 844 F.3d 670, 676 (7th Cir. 2016) (Plaintiff must allege that the attorney's negligence "caused the plaintiff to lose a valid . . . defense in the underlying action and that, absent that loss [of that valid defense], the underlying claim 'would have been successful.'").

Yet Midwest steadfastly maintains its equivocal allegation that but for the conduct of the Defendant, "the result of the trial would have been different, and a lesser or no amount [in punitive damages] would have been paid by Plaintiffs . . ." (C-33; A-14; A-18) In other words, it is Midwest's position that even if it is adjudged by the jury in this legal malpractice case to have wrongly fired Mr. Crane, it still has the right to recover some or all of its punitive damages from the Defendants. That cannot be the law, as it completely defies Illinois public policy behind the imposition of punitive damages.

The Circuit Court, and thereafter the Appellate Court, appear to rely upon conclusions outside the pleadings to overcome this obvious incongruity. The Circuit Court stated in its order that "Midwest alleges that, but for the negligence of its attorneys, . . . the jury would not have viewed the conduct of Midwest as willful, malicious, or wanton." (C-71; A-28) The Circuit Court further stated that "the punitive damages are alleged to have

been incurred [by an allegedly innocent party] only because of the attorney's conduct." (C-72; A-29) These allegations are nowhere found in the pleadings however. The Appellate Court thereafter adopted the same incorrect narrative that Midwest has alleged that it was completely innocent. Indeed, the Appellate Court quotes extensively from the Circuit Court's order, including the language that Midwest is the "allegedly innocent party." (C-72; A-5)

To the contrary, Midwest has never alleged that it was innocent and would have prevailed in the underlying case but for the conduct of the Defendants. (C-21, C-59-60; A-14, A-18) The Amended Complaint alleged only that "the result of the trial would have been different" and that the verdict would have been "lesser or none." That leaves open the very real possibility that Midwest can still recover some or all of its punitive damages if the second jury determines that Midwest illegally fired Mr. Crane but that it would have awarded less in punitive damages than the first jury did. Such a result is clearly incorrect, in that it is completely contrary to the public policy behind the imposition of punitive damages in Illinois. Specifically, because punitive damages are awarded for punishment and deterrence, it would be improper to allow the wrongdoer to shift them away to another. *Beaver v. Country Mutual Insurance Co.*, 95 Ill. App. 3d at 1124.

It is not surprising that Midwest attempts to leave its options open. Indeed, if a client in a legal malpractice case did not have the burden of proving it would have been successful, every unsuccessful defendant could potentially make a malpractice claim against its attorney in the hope that a second jury may conclude that the first award was excessive notwithstanding that defendant's guilt. That is what Midwest seeks here, including its claim for some or all of its punitive damages. Midwest would indeed allow

the jury in the legal malpractice case a roving commission to speculate about the proper amount of punitive damages that should have been awarded in the underlying case even if it determines that Midwest acted unlawfully in firing Crane. And it does so knowing that it has nothing to lose, as this second jury will not have the power to make Midwest pay anything more to Crane than it already has. As this Court noted in *Tri-G*, a judgment of punitive damages in the underlying case "is an expression of the [first] jury's moral condemnation" that is "inherently subjective" and therefore cannot be "objectively determine[d] . . . with any legal certainty" by a second jury in a later legal malpractice case. *Tri-G*, 856 N.E.2d at 414. Even the Circuit Court acknowledged the speculation that would be necessary for a jury in this case to determine whether the first jury would have awarded "a lesser or no amount in punitive damages" if additional evidence had been heard. (C-72; A-29).

In sum, the Appellate Court erred in allowing the recovery of punitive damages given Midwest's claim that it is seeking some or all of those damages from the attorney Defendants even if it does bear some guilt. First, it defies Illinois' public policy behind punitive damages to allow someone who may be guilty to be able to recover some or all of its punitive damages from another. Second, it is necessarily speculative to allow a second jury to determine what punitive damages it thinks the first jury should or may have awarded had the evidence been presented in a different way. The Appellate Court should therefore be reversed because the public policy of Illinois precludes Midwest from attempting to shift its punitive damages to its attorneys.

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

As discussed previously, 735 ILCS 5/2-1115 was enacted by the General Assembly to protect all attorneys from exposure to liability for unrestrained punitive damages, and to ensure the availability of legal services for litigants. The Appellate Court has now however carved out a broad exception for defense attorneys in civil cases, making them potentially liable for their client's punitive damages, even when their clients may in fact be guilty. Indeed, the effect of this new rule is that while plaintiffs' attorneys will never be exposed to lost punitive damages (under *Tri-G)*, defense attorneys who may not have any significant assets will nevertheless have potentially unlimited liability for punitive damages lost by their clients. For defense lawyers who carry malpractice insurance, this will almost certainly "result in increased professional liability insurance premiums or denials of coverage" altogether. *See Tri-G*, 222 Ill.2d at 266. This may also effectively preclude or deter many lawyers from undertaking representation of defendants in controversial cases and "make it more difficult for consumers to obtain legal services," particularly in those hostile venues where the risks of unrestrained punitive verdicts are becoming more common. *Id.* at 261. The Appellate Court's Opinion, in essence, is likely to further exacerbate access to justice issues throughout Illinois.

This new rule is obviously of profound importance to the attorney Defendants in this case as well as to any other attorney who defends civil cases in Illinois. Against this backdrop, however, the Appellate Court declined to discuss this development in any meaningful way. Indeed, the Appellate Court acknowledged the Circuit Court's finding

that "public burdens are at stake," including the problem of "making legal services more difficult to obtain." (C-73; A-7) But the Appellate Court failed to address or discuss the import of those public burdens, or explain why those were of no consequence. Nor did it explain why defense lawyers in civil cases should as a class be entitled to less protection than plaintiffs' lawyers. That is particularly concerning given that 735 ILCS 5/2-1115 does not create any such distinction and on its face provides complete protection to all attorneys from liability for all punitive damages in legal malpractice cases.

Simply put, 735 ILCS 5/2-1115 was enacted to protect the legal marketplace, but the Appellate Court wrongly carved out an exception for civil defense lawyers. Such an exception finds no basis in the statute or the public policies behind the statute. The Appellate Court should therefore be reversed, particularly in the instant case, given that Midwest is attempting to shift its punitive damages, at least in part, over to its attorney Defendants.

CONCLUSION

The Opinion of the Appellate Court allowing Midwest to recover its lost punitive damages in a legal malpractice case completely undermines the clear language and purpose of 735 ILCS 5/2-1115 and creates a new and unjustified exception to the statute against all civil defense attorneys. The Opinion further violates the public policy behind punitive damages in Illinois that a wrongdoer may not shift its punitive damages to another. Indeed, that is particularly true here, where Midwest is claiming a right to seek some or all of its lost punitive damages, even if a second jury agrees with the first jury that Midwest fired Mr. Crane for unlawful reasons. Simply put, the Appellate Court erred in answering the certified question in the negative, as 735 ILCS 5/2-1115 and Illinois public policy bar the

recovery of punitive damages in legal malpractice cases, particularly when the claim is for some or all of the punitive damages.

Defendants respectfully request 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 thereafter.

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	)	**Oral Argument Requested**

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 Brief conforms to the requirements of Rules 341(a) and (b). The length of this 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 22 pages.

FURTHER AFFIANT SAYETH NOT.

Gary A. Meadows

STATE OF ILLINOIS)

COUNTY OF MADISON)

SUBSCRIBED AND SWORN to before me on this 23rd day of November, 2021, 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 Ficker

"OFFICIAL SEAL"
TINA FICKER
NOTARY PUBLIC — STATE OF ILLINOIS
MY COMMISSION EXPIRES DEC. 1, 2021

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Defendants-Appellants.	)	**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 23rd day of November, 2021:

1. 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 23rd day of November, 2021:

George R. Ripplinger
Ripplinger & Zimmer, LLC
Attorneys at Law
2215 West Main Street
Belleville, IL 62226
george@ripplingerlaw.com

/s/ Gary A. Meadows
HeplerBroom, LLC
Gary A. Meadows-06209493
gam@heplerbroom.com
Theodore J. MacDonald Jr.-03125246
tjm@heplerbroom.com
Attorneys for the Defendants-Appellants
Sandberg Phoenix & Von Gontard, P.C.
John Gilbert, and Narcisa Symank
130 N. Main Street
P.O. Box 510
Edwardsville, IL 62025
Telephone: 618/656-0184
Facsimile: 618/656-1364

PROOF OF SERVICE

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

George R. Ripplinger
Ripplinger & Zimmer, LLC
Attorneys at Law
2215 West Main Street
Belleville, IL 62226
george@ripplingerlaw.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

on this 23rd day of November, 2021.

/s/ Gary A. Meadows

E-FILED
11/23/2021 9:47 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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**

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 23rd day of November, 2021, he caused to be electronically filed the following documents with the Clerk of the Illinois Supreme Court, 202 E. Capital Ave., Springfield, IL 62701.

- Brief of the Appellants with Appendix
- 341 C Affidavit
- Notice of Filing

And that he electronically served via email on this 23rd day of November, 2021, the Brief of the Appellants and all other documents listed above to:

George R. Ripplinger
Ripplinger & Zimmer, LLC
Attorneys at Law
2215 West Main Street
Belleville, IL 62226
george@ripplingerlaw.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

Dated this 23rd day of November, 2021.

/s/ Gary A. Meadows
HeplerBroom, LLC
Gary A. Meadows-06209493
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Theodore J. MacDonald Jr.-03125246
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MIDWEST SANITARY SERVICE, NANCY DONOVAN, and BOB EVANS, SR.,	)	**Appeal from the Appellate Court of Illinois, Fifth District**
Plaintiffs-Respondents,	)	**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-Petitioners	)	**Honorable David W. Dugan, Judge Presiding**
	)	**Oral Argument Requested**

APPENDIX

TABLE OF CONTENTS TO THE APPENDIX

E-FILED
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Carolyn Taft Grosboll
SUPREME COURT CLERK

2021 IL App (5th) 190360

NO. 5-19-0360

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MIDWEST SANITARY SERVICE, INC.; NANCY DONOVAN; and BOB EVANS SR.,	)	Appeal from the Circuit Court of Madison County.
Plaintiffs-Appellees,	)	
v.	)	No. 18-L-811
SANDBERG, PHOENIX & VON GONTARD, P.C.; JOHN GILBERT; and NARCISA SYMANK,	)	Honorable David W. Dugan,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court, with opinion.
Presiding Justice Boie and Justice Barberis concurred in the judgment and opinion.

OPINION

¶ 1 The defendants, Sandberg, Phoenix & Von Gontard, P.C., John Gilbert, and Narcisa Symank, appeal, pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017), those portions of the June 3, 2019, order of the circuit court of Madison County that denied their motion to dismiss and strike those portions of the legal malpractice complaint filed by the plaintiffs, Midwest Sanitary Service, Inc. (Midwest), Nancy Donovan, and Bob Evans Sr., that request reimbursement for punitive damages the plaintiffs allege they would not have had to incur absent the defendants' professional negligence. On August 9, 2019, the circuit court entered an order certifying the following question for immediate appeal pursuant to Rule 308:

"Does Illinois' public policy on punitive damages and/or 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?"

¶ 2 For the following reasons, we answer the certified question in the negative. Accordingly, we affirm the circuit court's June 3, 2019, order.

¶ 3 BACKGROUND

¶ 4 On February 25, 2019, the plaintiffs filed their first amended complaint against the defendants in the circuit court of Madison County. According to the complaint, the plaintiffs hired the defendants in 2015 to represent them in a jury case in Madison County in which Paul Crane, an employee of Midwest, sued the plaintiffs for retaliatory discharge (the underlying action). According to the complaint, Crane had alleged in the underlying action that the plaintiffs wrongfully terminated him from employment at Midwest for making a complaint to the Illinois Environmental Protection Agency (IEPA) that Midwest had engaged in the unauthorized and illegal dumping and/or storage of toxic waste.

¶ 5 According to the complaint, during their representation of the plaintiffs, the defendants breached their professional duties to the plaintiffs in the following respects: (1) failed to list all witnesses intended to be called at trial in compliance with Illinois Supreme Court Rule 213(f) (eff. Jan. 1, 2007), resulting in six witnesses for the defense being barred; (2) failed to identify a voicemail 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; (3) failed to object to the language of the 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; (4) elicited testimony on cross-examination of IEPA 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; and (5) 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 negotiate by simply stating, "no," without informing the plaintiffs.

¶ 6 The complaint alleges that, but for the foregoing negligent acts or omissions on the part of the defendants, the result of the trial in the underlying action would have been different, in that the jury would have awarded lesser or no damages to Crane. Essentially, the plaintiffs allege that the defendants' professional negligence precluded them from proving to the jury that they had a nonretaliatory reason for discharging Crane. Count I requests damages of $603,932.03 plus costs on behalf of all the plaintiffs. Count II requests damages of $1,068,932.03 plus costs on behalf of Midwest only.[1]

¶ 7 On April 12, 2019, the defendants filed a motion to dismiss and strike the plaintiffs' amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code). 735 ILCS 5/2-619.1 (West 2018). Of import to this appeal, the defendants argued in this motion that Midwest "is improperly trying to recoup from the [d]efendants the punitive damages portion of the underlying jury verdict, which is not permitted under Illinois law." On June 3, 2019, the circuit court entered an order denying the motion to dismiss and strike. On June 24, 2019, the defendants filed a motion to reconsider or, in the alternative, to certify for immediate appeal, pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017), the issue of whether the plaintiffs could seek

[1]Further facts regarding the underlying matter can by found in this court's order affirming the judgment. *Crane v. Midwest Sanitary Service, Inc.*, 2017 IL App (5th) 160107-U.

recovery of the punitive damages they paid in the underlying case. On August 9, 2019, the circuit court granted the defendants' motion to certify the question for immediate appeal.

¶ 8 On August 23, 2019, the defendants filed an application for leave to appeal to this court pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017). This court initially denied the application, and the defendants filed a motion for a supervisory order in the Illinois Supreme Court that would require this court to grant the defendants' application for leave to appeal. On February 20, 2020, the supreme court allowed the defendants' motion for a supervisory order and directed this court to allow the application. Accordingly, on February 20, 2020, this court entered an order vacating its prior order denying the application and entered a new order granting the application.

¶ 9 ANALYSIS

¶ 10 Because this appeal concerns a question of law certified by the circuit court pursuant to Illinois Supreme Court Rule 308 (eff. July 1, 2017), our standard of review is *de novo*. *Crawford County Oil, LLC v. Weger*, 2014 IL App (5th) 130382, ¶ 11. On appeal, the defendants argue that the statutory prohibition on the recovery of punitive damages in a legal malpractice case (735 ILCS 5/2-1115 (West 2018)),[2] as well as Illinois public policy, bars the plaintiffs from recovering the punitive damages they claim they were required to pay as a result of the defendants' negligence in representing them in the underlying action. The plaintiffs counter that as between them and the defendants, these damages are compensatory in nature because they are a direct result of the defendants' negligence in representing them. Both parties agree that this is an issue of first impression in Illinois but that the supreme court's decision in *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218 (2006), may be instructive.

[2]Section 2-1115 of the Code (735 ILCS 5/2-1115 (West 2018)) provides that "[i]n 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."

¶ 11 In *Tri-G*, the plaintiff brought a legal malpractice action against its former attorney to recover damages it sustained as a result of the attorney's failure to prosecute a complaint. *Id.* at 224-25. The plaintiff asserted that, but for the attorney's negligence, it would have recovered compensatory and punitive damages against the defendant in the underlying action. *Id.* at 225. Like the defendants in this case, the attorney argued that the plaintiff was barred from recovering the punitive damages because section 2-1115 of the Code (735 ILCS 5/2-1115 (West 2002)) bars such damages in legal malpractice cases. *Tri-G*, 222 Ill. 2d at 259. In a split (4 to 3) decision, the supreme court held that the plaintiff could not recover its lost punitive damages from its attorney, citing extensively from the California case of *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP*, 69 P.3d 965 (Cal. 2003). *Tri-G*, 222 Ill. 2d at 259-67. However, we agree with the circuit court, which found, in a detailed and well-written order, that the reasoning employed in *Tri-G* and *Ferguson* does not apply to the situation we face in the case at bar.

¶ 12 First, in *Tri-G*, the majority found that allowing recovery of lost punitive damages would defeat the punitive and deterrent purposes of punitive damages because the negligent attorney is not the tortfeasor who committed the intentional or malicious acts that gave rise to the punitive damages claim in the underlying case. *Id.* at 259-60. The circuit court explained, however, that

> "in a case such as the present case, where the punitive damages are alleged to have been incurred only because of the attorney's conduct, the responsibility [for the payment of such damages] would shift from an allegedly innocent party to a negligent party. [As such,] if [the plaintiff] was improperly judged due to the exclusion of exculpatory evidence in the underlying case, and it is truly innocent of the charge of willful, malicious and wanton conduct, the policy against burden shifting seemingly fails. The opposite conclusion would mean that the allegedly innocent party *** would suffer the very specific punishment of

having to pay the punitive damages and would at the same time be left with no recourse for compensation. Certainly, no societal purpose is served by such a doctrine. So, the [s]upreme [c]ourt's concern expressed in *Tri-G* regarding the deterrence purpose of punitive damages in lost punitive damage cases seems inapplicable in cases where the negligence of an attorney results in the imposition of punitive damages against his client."

¶ 13 Second, in *Tri-G*, the majority reasoned that allowing recovery of lost punitive damages would violate the public policy against speculative damages because it would require the jury in the malpractice case to effectively guess at whether the jury in the underlying case would award punitive damages and how much it would have awarded. *Id.* at 260. However, the circuit court found:

"In cases, such as the one at hand, however, and particularly where the punitive damage[s] [are] in a specific amount and liquidated, that reasoning loses traction.

Much of the proofs required to be made in the search for a recovery of incurred punitive damages are already accounted for in proving the claim for traditional compensatory damages. In its quest for traditional compensatory damages, [the plaintiff] will be required to prove that, had its attorneys not been negligent, the jury would have not found in favor of [the plaintiff in the underlying action]. If the jury in this matter finds that the defendants were negligent and that their negligence caused the *** jury to find in favor of the [plaintiff in the underlying action] for his compensatory damages, it seemingly follows that it could also find that that same negligence caused [the plaintiff] to lose on the issue of punitive damages. Thus, success or failure of the claim for recovery of incurred punitive damages is largely co-extensive with the claim for traditional compensatory damages. Therefore, proofs for the recovery of incurred punitive damages, unlike the lost

> opportunity to recover punitive damages, are no more speculative than proofs for the recovery of traditional compensatory damages. *** Courts regularly call upon juries to make this determination in an environment of uncertainty in legal malpractice cases involving only traditional compensatory damages. This [c]ourt discerns no reason why a jury cannot be called upon to venture into that same realm when deciding whether to award the [p]laintiff for *all* the amounts it incurred as a result of the verdict in the underlying matter." (Emphasis in original.)

¶ 14 Finally, in *Tri-G*, the majority found that the recovery of lost punitive damages would exact a societal cost in the form of increased legal malpractice insurance premiums and exclusions, making legal services more difficult to obtain. In addition, the *Tri-G* court pointed out that lost punitive damages are not necessary to make a successful plaintiff whole in a legal malpractice action because a plaintiff is made whole by the award of compensatory damages, and punitive damages constitute an "undeserved windfall." *Id.* at 260-61. While the circuit court found that the same public burdens are at stake in the case at bar, it found that

> "unlike cases involving the loss of the opportunity to recover punitive damages, the plaintiff here would not be 'made whole by [traditional] compensatory damages' alone, nor would recovery for the punitive damages it should not have been adjudged to pay constitute an 'undeserved windfall'. Here, the [p]laintiff was allegedly damaged when it was ordered to pay out a specific amount of money as punitive damages that it claims it would not have had to pay 'but for' the negligence of its attorneys. Any recovery would serve to compensate [the plaintiff] for [its] actual and out-of-pocket losses if, indeed, [the plaintiff] meets its burden of proof."

¶ 15 Having examined the reasoning of the circuit court in distinguishing the case at bar from *Tri-C*, we agree with its conclusion that

> "it appears that the unique characteristics associated with legal negligence claims for lost punitive damages, and for which the Illinois Supreme Court [in *Tri-C*] and the *Ferguson* court expressed concern, do not necessarily attend legal negligence claims for the recovery of paid or incurred punitive damages. Absent those unique characteristics, it seems to this court that there *** exists no just reason to deny the plaintiff in this case the opportunity to recover its actual loss. It should be remembered that '[t]he general rule of damages in a tort action is that the wrongdoer is liable for all injuries resulting directly from the wrongful acts ***, provided the particular damages are the legal and natural consequences of the wrongful act imputed to the defendant, and are such as might reasonably have been anticipated. ***' *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 543 (1996)."

¶ 16 CONCLUSION

¶ 17 Although, as explained above, our standard of review is *de novo*, we find persuasive the thorough reasoning of the circuit court and find no reason to disturb it. In short, we agree that punitive damages that are assessed against a litigant as a proximate result of the professional negligence of its attorney are not, in the context of a subsequent legal malpractice action against the attorney, punitive in nature but are, instead, compensatory in nature and therefore not barred by public policy or by the terms of section 2-1115 of the Code. 735 ILCS 5/2-1115 (West 2018). Accordingly, we answer the certified question in the negative, affirm the circuit court's June 3, 2019, order, and remand this cause for further proceedings.

¶ 18 Certified question answered.

¶ 19 Affirmed and remanded.

No. 5-19-0360

Cite as:	*Midwest Sanitary Service, Inc. v. Sandberg, Phoenix & Von Gontard, P.C.*, 2021 IL App (5th) 190360
Decision Under Review:	Appeal from the Circuit Court of Madison County, No. 18-L-811; the Hon. David W. Dugan, Judge, presiding.
Attorneys for Appellant:	Gary A. Meadows and Theodore J. MacDonald Jr., of HeplerBroom, LLC, of Edwardsville, for appellants.
Attorneys for Appellee:	George R. Ripplinger, of Ripplinger & Zimmer, LLC, of Belleville, for appellees.

EFILED
Case Number 2018L 000811
Date: 2/25/2019 3:27 PM
Mark Von Nida
Clerk of Circuit Court
Third Judicial Circuit, Madison County Illinois

IN THE CIRCUIT COURT
THIRD JUDICIAL DISTRICT
MADISON COUNTY, ILLINOIS

MIDWEST SANITARY SERVICE, Inc., NANCY DONOVAN, and BOB EVANS, SR. Plaintiffs, v. SANDBERG, PHOENIX & VON GONTARD, P.C. JOHN GILBERT, and NARCISA SYMANK Defendants.	)	No. 2018 L 000811

FIRST AMENDED COMPLAINT
Count I

Come now the Plaintiffs, Nancy Donovan, Bob Evans, Sr. and Midwest Sanitary Service, Inc., by and through their attorneys, Ripplinger & Zimmer LLC, and for Count I of this First Amended Complaint against Defendants state:

1. At all times relevant herein, Defendants had an attorney-client relationship with Plaintiffs, whereby Defendants agreed to provide timely, competent legal services and advice in connection with their representation of Plaintiffs.

2. At all times relevant herein, Defendants John Gilbert and Narcisa Symank were employees or shareholders in Sandberg, Phoenix & Von Gontard, P.C. which firm maintained an office in the state of Illinois for the practice of law.

3. Defendants had a duty to their clients to use that degree of skill and diligence ordinarily used under the same or similar circumstances by members of the legal profession.

4. Plaintiffs hired Defendants on 4/20/15 to represent them in a jury case in Madison County, Illinois, Cause No. 14L501, where they were alleged to have wrongfully terminated Midwest Sanitary Service, Inc.'s (hereinafter, "Midwest") employee Paul Crane for making a complaint to the Illinois Environmental Protection Agency or other federal or state agencies that Midwest had engaged in the unauthorized and illegal dumping and/or storage of toxic waste or other substances hazardous to the health and well-being of the public.

5. In an email dated 4/18/15, Defendant Gilbert assured Plaintiffs that he had "reviewed the file", and again assured Plaintiffs that he had "reviewed the entire case file" in an email on 5/8/15.

6. 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."

7. Trial began November 9, 2015.

8. On November 17, 2015 a jury verdict was reached in favor of Paul Crane and against Midwest Sanitary Service, Inc., Bob Evans, Sr. and Nancy Donovan in the amount of $160.000.00.

9. On July 15, 2016 Paul Crane was awarded $225,000.00 for his attorney fees. Gilbert's response in an email to his clients was: "They will get nothing, of course, when the appellate court overturns the judgment."

10. Disregarding their duty to Plaintiffs, during the course of Defendants' representation of plaintiffs in the matter, defendants:

a) 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;

b) 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;

c) 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;

d) Elicited testimony on cross-examination of IEPA 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;

e) 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 by simply stating "No", without any discussion with, or even informing, his clients.

11. During and after the trial, John Gilbert continually reassured Plaintiffs, both orally and by email, that the judge had ruled in error on these matters and that the appellate court would rectify "this miscarriage of justice", up to and including the time defendants received notification that the Illinois Supreme Court declined the defendants' Petition for Leave to Appeal on October 3, 2017.

12. Plaintiffs relied on the numerous assurances by Defendants that the verdict in the case would be overturned on appeal, and that they would be vindicated.

13. Defendants were paid $218,932.03 by Plaintiffs as attorney's fees and costs for providing the alleged defense of Plaintiffs.

14. But for one or more of the above negligent acts or omissions on the part of Gilbert, 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.

WHEREFORE, Plaintiffs pray for judgment against Defendants Gilbert, Symank and Sandberg, Phoenix & Von Gontard, P.C., jointly and severally, in the amount of $603,932.03, for costs of this suit, and for such other and further relief as this Court deems fair and just.

PLAINTIFFS DEMAND TRIAL BY JURY

Count II

Comes now the Plaintiff, Midwest Sanitary Service, Inc., by and through its attorneys, Ripplinger & Zimmer LLC, and for Count II of this First Amended Complaint against Defendants Gilbert, Symank and Sandberg, Phoenix & Von Gontard, P.C., states:

1. At all times relevant herein, Defendants had an attorney-client relationship with Plaintiff, whereby Defendants agreed to provide timely, competent legal services and advice in connection with their representation of Plaintiff.

2. At all times relevant herein, Defendants John Gilbert and Narcisa Symank were employees or shareholders in Sandberg, Phoenix & Von Gontard, P.C. which firm maintained an office in the state of Illinois for the practice of law.

3. Defendants had a duty to their client to use that degree of skill and diligence ordinarily used under the same or similar circumstances by members of the legal profession.

4. Plaintiffs hired Defendants on 4/20/15 to represent them in a jury case in Madison County, Illinois, Cause No. 14L501, where they were alleged to have wrongfully terminated Midwest Sanitary Service, Inc.'s (hereinafter, "Midwest") employee Paul Crane for making a complaint to the Illinois Environmental Protection Agency or other federal or state agencies that Midwest had engaged in the unauthorized and illegal dumping and/or storage of toxic waste or other substances hazardous to the health and well-being of the public.

5. In an email dated 4/18/15, Defendant Gilbert assured Plaintiff that he had "reviewed the file", and again assured Plaintiff that he had "reviewed the entire case file" in an email on 5/8/15.

6. 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."

7. Trial began November 9, 2015.

8. On November 17, 2015 a jury verdict was reached in favor of Paul Crane and against Midwest Sanitary Service, Inc. for retaliatory discharge and assessed punitive damages against Midwest in the amount of $625,000.00.

9. On July 15, 2016 Paul Crane was awarded $225,000.00 for his attorney fees. Gilbert's response in an email to his client was: "They will get nothing, of course, when the appellate court overturns the judgment."

10. Disregarding their duty to Plaintiff, during the course of Defendants' representation of plaintiff in the matter, defendants:

a) 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;

b) 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;

c) 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;

d) 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;

e) 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 by simply stating "No", without any discussion with, or even informing, his client.

11. During and after the trial, John Gilbert continually reassured Plaintiff, both orally and by email, that the judge had ruled in error on these matters and that the appellate court would rectify "this miscarriage of justice", up to and including the time Midwest received notification that the Illinois Supreme Court declined Midwest's Petition for Leave to Appeal on October 3, 2017.

12. Plaintiff relied on the numerous assurances by Defendants that the verdict in the case would be overturned on appeal, and that Midwest would be vindicated.

13. Defendants were paid $218,932.03 by Midwest as attorney's fees and costs for providing the alleged defense of Plaintiff.

14. But for one or more of the above negligent acts or omissions on the part of Gilbert and Symank and Gilbert, 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.

WHEREFORE, Plaintiff Midwest prays for judgment against Defendants Gilbert, Symank and Sandberg, Phoenix & Von Gontard, P.C., jointly and severally, in the amount of $1,068,932.03, for costs of this suit, and for such other and further relief as this Court deems fair and just.

PLAINTIFF DEMANDS TRIAL BY JURY

George R. Ripplinger #02343797
Ripplinger & Zimmer, LLC
2215 West Main Street
Belleville, Illinois 62226
Phone (618)234-2440
Fax (618)234-6728
RipplingerZimmer@ripplingerlaw.com
george@ripplingerlaw.com

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

I, George R. Ripplinger, pursuant to S. Ct. Rule 222(b), state that the total amount of damages sought in Plaintiff's Complaint is in excess of $50,000.00.

George R. Ripplinger #02343797

Subscribed and sworn to before me this 25th day of February, 2019.

Notary Public

RIPPLINGER & ZIMMER, LLC
Attorneys at Law
2215 West Main Street
Belleville, IL 62226
(618) 234-2440
FAX: 618-234-6728
RipplingerZimmer@ripplingerlaw.com
george@ripplingerlaw.com

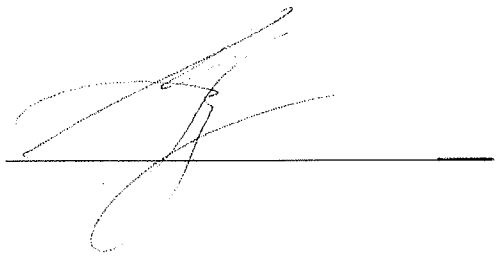
OFFICIAL SEAL
TERRY RIPPLINGER
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:11/09/19

Proof of Service

The undersigned attorney hereby certifies that on the 25th day of February, 2019, copies of the foregoing was served upon the attorneys of record of all parties to the above case by the Odyssey E-File System to:

Gary Meadows
gmeadows@heplerbroom.com

Theodore Macdonald Jr.
tmacdonald@heplerbroom.com



IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

MIDWEST SANITARY SERVICE, NANCY DONOVAN, and BOB EVANS, SR. Plaintiffs	)	
-vs-	)	No. 18 L 811
SANDBERG, PHOENIX & VONGONTARD, PC JOHN GILBERT and NARCISA SYMANK. Defendants	)	

ORDER

This matter comes before the Court on the defendants' Motion to Dismiss and Strike pursuant to 735 ILCS 5/2-615, 735 ILCS 5/2-619, 735 ILCS 5/2-619.1. ("Motion").[1] The parties have briefed and argued for their respective positions relative to the Motion.

The central issues presented by the Motion are: (1) whether the plaintiff has adequately pled a cause of action for legal malpractice; and (2) whether 735 ILCS 5/2-1115 or public policy operates to bar a plaintiff in a legal malpractice action from recovering as damages the amounts that the plaintiff was adjudged to owe as punitive damages in the underlying case.

The Court, having been fully advised in the premises, finds and orders as follows:

Factual Background and Procedural History:

Since the present matter consists of a claim for legal malpractice, it is helpful to review the basic facts of the underlying matter, Paul Crane v Midwest Sanitary Service, Inc., Bob Evans, Sr., Bob Evans, Jr, and Nancy Donovan, Madison County case 14 L 501. ("Underlying case"). In the underlying case, Paul Crane filed his three-count Complaint for retaliatory discharge (Counts I & II) and for violation of the Illinois Whistleblower Act (Count III) (740 ILCS 174/5, et. seq). In Count II of the Complaint, the Paul Crane sought punitive damages against Midwest only.

[1] Defendants filed a similar motion on October 3, 2018 which was granted insofar as to dismiss pursuant to 5/2-615 and the plaintiffs were granted leave to amend. Other aspects of the motion were not ruled on pending the plaintiffs filing of their Amended Complaint. The plaintiffs filed their Amended Complaint and defendants responded on April 12, 2019 with the Motion to Dismiss and Strike addressed in this order.

Prior to trial in the underlying matter, the plaintiff filed a motion seeking to bar several witnesses who the plaintiff claimed were not properly disclosed under Supreme Court Rule 213(f). The trial judge granted the motion and barred those witnesses from testifying.

Following trial, a verdict was entered against each of the plaintiffs in this matter. Compensatory damages in the amount of $160,000 were awarded against Midwest and the individual plaintiffs. Punitive damages in the amount of $625,000 were awarded against Midwest alone. An appeal was taken.

On the appeal of the underlying case, the appellate court affirmed the trial court's ruling that the barring of the several witnesses was not an abuse of discretion. (*Crane v Midwest Sanitary Service, Inc.*, 2017 IL App. (5th) 160107-U) The appellate court conducted an exhaustive portrayal of the facts in the underlying case and there is no need to repeat them here.

The individual plaintiffs here seek recovery of the amounts awarded for compensatory damages, attorneys' fees awarded under the whistleblower act and attorneys' fees paid to the defendants for their representation of them in the underlying action. Midwest seeks recovery for the punitive damages for which it became liable to Crane.

Defendants filed their Motion seeking to have the Amended Complaint dismissed under 735 ILCS 5/2-615, 735 ILCS 5/2-619, 735 ILCS 5/2-619.1.

Motions Practice Under 2-615:

A motion under section 2–615 of the Code of Civil Procedure attacks the legal sufficiency of the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 484, 203 Ill.Dec. 463, 639 N.E.2d 1282 (1994). Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *Illinois Graphics*, 159 Ill.2d at 484, 203 Ill.Dec. 463, 639 N.E.2d 1282; *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 8, 180 Ill.Dec. 307, 607 N.E.2d 201 (1992). Thus, the question presented by a section 2–615 motion is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Vernon v. Schuster*, 179 Ill.2d 338, 344, 228 Ill.Dec. 195, 688 N.E.2d 1172 (1997); *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 86–87, 220 Ill.Dec. 195, 672 N.E.2d 1207 (1996). In ruling on a section 2–615 motion, a trial court is to consider only the allegations of the pleadings. *Illinois Graphics*, 159 Ill.2d at 484, 203 Ill.Dec. 463, 639 N.E.2d 1282; *Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 475, 159 Ill.Dec. 50, 575 N.E.2d 548 (1991). Further, the trial court should dismiss the cause of action only if it is

clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery. *Bryson,* 174 Ill.2d at 86–87, 220 Ill.Dec. 195, 672 N.E.2d 1207; *Illinois Graphics,* 159 Ill.2d at 488, 203 Ill.Dec. 463, 639 N.E.2d 1282. *Canel v. Topinka*, 212 Ill. 2d 311, 317–18, 818 N.E.2d 311, 317 (2004).

Specifically, the defendants assert that the plaintiffs have not adequately pled a cause of action for legal malpractice and argue that the Plaintiffs are required to "set forth the facts from the underlying case to establish that Midwest and its officers would have prevailed on the claims made by its employee absent the allege malpractice" and to "include facts upon which to base a conclusion that they would have won the underlying case filed by the employee absent the alleged malpractice." (Motion, ¶¶ 4 and 5).

To prevail on a legal malpractice claim, the plaintiff client must plead and prove (1) that the defendant attorney owed the plaintiff client a duty of due care arising from the attorney-client relationship, (2) that the defendant attorney breached that duty, and (3) that as a proximate result, the plaintiff client suffered injury." *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.,* 216 Ill.2d 294, 306, 297 Ill.Dec. 319, 837 N.E.2d 99 (2005), citing *Sexton v. Smith,* 112 Ill.2d 187, 193, 97 Ill.Dec. 411, 492 N.E.2d 1284 (1986).*Warnock v. Karm Winand & Patterson*, 376 Ill. App. 3d 364, 368, 876 N.E.2d 8, 11–12 (1st Dist. 2007), *as modified on denial of reh'g (Sept. 7, 2007).*

It is the proximate cause --- "but for" --- element of the claim of legal malpractice that the Defendants argue is not adequately pled in the plaintiffs' Amended Complaint. To satisfy the proximate cause aspect of a malpractice action, the plaintiff must essentially plead and prove a "case within a case," meaning that the malpractice complaint is dependent on the underlying lawsuit. *Sharpenter v. Lynch,* 233 Ill.App.3d 319, 323, 174 Ill.Dec. 680, 599 N.E.2d 464, 467 (1992). Thus, no malpractice exists unless the plaintiff proves that, but for the attorney's negligence, plaintiff would have been successful in the underlying action. *Ignarski v. Norbut,* 271 Ill.App.3d 522, 525–26, 207 Ill.Dec. 829, 648 N.E.2d 285, 288 (1995). See *Fabricare Equip. Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill. App. 3d 784, 788, 767 N.E.2d 470, 474 (1st Dist. 2002).

The plaintiffs here allege in detail the events that preceded the verdict in the underlying case. They allege the circumstances of the failure to disclose several witnesses, the court's order barring the non-disclosed witnesses, the failure to identify a recorded message from a Midwest

Customer, failure to object to the language of a limiting instruction, and refusal to discuss settlement with opposing counsel. The Plaintiffs go on to allege that, but for these allegedly negligent acts, the result of trial would have been different in the sense that the amount of the verdict would have been less or reduced to zero.

The court finds that, in reviewing the facts alleged in the light most favorable to the plaintiffs, the plaintiffs have adequately pled the cause of action of legal malpractice.

Motion Practice Under 2-619

Section 2–619(a)(9) of the Civil Practice Act provides that a defendant may file a motion for dismissal of the action on the grounds the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.[2] As such, "Section 2–619(a)'s purpose is to provide litigants with a method of disposing of issues of law and easily proved issues of fact—*relating to the affirmative matter*—early in the litigation." *Van Meter v. Darien Park District,* 207 Ill.2d 359, 367, 278 Ill Dec. 555, 799 N.E.2d 273, 278 (2003).

> A motion for involuntary dismissal under section 2–619(a)(9) of the Code admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint bars or defeats the cause of action. *Kean v. Wal–Mart Stores, Inc.*, 235 Ill.2d 351, 361, 336 Ill.Dec. 1, 919 N.E.2d 926, 931–32 (2009); *Smith v. Waukegan Park District,* 231 Ill.2d 111, 120, 324 Ill.Dec. 446, 896 N.E.2d 232, 238 (2008); *Snyder v. Heidelberger,* 2011 IL 111052, ¶ 8, 352 Ill.Dec. 176, 953 N.E.2d 415. In a section 2–619(a) motion, the movant is essentially saying " 'Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim.' " *Winters,* 386 Ill.App.3d at 792, 325 Ill.Dec. 729, 898 N.E.2d at 779. When ruling on the section 2–619(a)(9) motion, the court construes the pleadings "in the light most favorable to the nonmoving party" (*Sandholm v. Kuecker,* 2012 IL 111443, ¶ 55, 356 Ill.Dec. 733, 962 N.E.2d 418), and should only grant the motion "if the plaintiff can prove no set of facts that would support a cause of action" (*Snyder,* 2011 IL 111052, ¶ 8, 352 Ill.Dec. 176, 953 N.E.2d 415). A section 2–619(a)(9) motion dismissal is reviewed *de novo. Kean,* 235 Ill.2d at 361, 336 Ill.Dec. 1, 919 N.E.2d at 932. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶¶ 30-31, 988 N.E.2d 984, 993–94.

[2] Although the Motion does not reference the specific sub-section of 2-619(a) on which the defendants base their Motion, it appears from oral argument that it is 2-619(a)(9).

The defendants argue that Midwest is not permitted to recover for punitive damages under Illinois law and, therefore, Midwest's claim for recovery for those damages should be dismissed. 735 ILCS 5/2-1115 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."

Illinois case law has remained largely consistent in the enforcement of section 2-1115 in determining that punitive damages are not recoverable in legal malpractice cases. (see *Kennedy v. Grimsley*, 361 Ill. App. 3d 511, 514, 837 N.E.2d 131, 134 (3d Dist. 2005)) (where fraud claim allowed only when conduct is unrelated to issues of legal skill and ability) (Cf. *Cripe v. Leiter*, 291 Ill. App. 3d 155, 158, 683 N.E.2d 516, 519 (3d Dist. 1997)) (where the court noted: "Although section 2–1115 of the Code is broad enough to encompass any acts arising out of the provision of legal services, it is only applicable if the behavior alleged in the complaint amounts to legal malpractice."). Nevertheless, in determining the applicability of section 2–1115, the court must look to the "nature of the behavior alleged" in plaintiffs' complaint to "determine whether the activities fall within the term 'legal malpractice'." *Brush v. Gilsdorf*, 335 Ill. App. 3d 356, 360, 783 N.E.2d 77, 80 (3d Dist. 2002), *as modified on denial of reh'g (Jan. 3, 2003)*

In the present matter, the allegations contained in the Amended Complaint clearly provide the necessary elements of claims for professional negligence and legal malpractice. Each instance of breach of a duty alleged in the Amended Complaint is wholly related to the providing of legal services, legal skill and legal ability. No allegations of any conduct unrelated to the providing of legal services is made. Accordingly, 2-1115 would seemingly act as a bar to the recovery of punitive damages. However, here, Midwest asserts that it is not seeking "punitive damages" but, rather, a recovery of the money it was ordered to pay as punitive damages. Neither counsel nor this court has been able to locate Illinois precedent addressing this particular issue. Still, there is case law that provides some guidance as to how our Supreme Court might view the question.

The parties cite the Illinois Supreme Court's decision in *Tri-G v Burke, Bosslman & Weaver*, 222 Ill. 2d 218 (2006). In that case, the history and facts are extensive and are set forth in detail in the decision. For our purposes, it suffices to illuminate these facts: Tri-G brought a legal malpractice action against their former attorneys, Burke, to recover damages it sustained as a result of the attorney's failure to prosecute a complaint. Tri-G asserted that it had suffered damages in

the sense that it had a suffered a lost opportunity to recover both compensatory and punitive damages due to the Burke's negligence. Burke argued that punitive damages are not recoverable because section 2-1115 bars such damages in legal malpractice cases. At trial on the malpractice claim, the jury found the attorney to be negligent and that, but for the negligence, Tri-G would have recovered both compensatory and punitive damages in the underlying action. Burke appealed.

The appellate court, in affirming the judgment, noted that the question of whether section 2-1115 bars a party from recovering lost opportunity punitive damages to be of first impression. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 353 Ill. App. 3d 197, 200, 817 N.E.2d 1230, 1237 (2d Dist. 2004), *aff'd in part, rev'd in part,* 222 Ill. 2d 218, 856 N.E.2d 389 (2006) That court conducted an extensive examination of the cases from other jurisdictions where the same question was reached.

> In other jurisdictions, there are conflicting decisions on this issue. Courts in California and New York have held that lost punitive damages are not recoverable in a legal malpractice case. *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP,* 30 Cal.4th 1037, 69 P.3d 965, 135 Cal.Rptr.2d 46 (2003); *Summerville v. Lipsig,* 270 A.D.2d 213, 704 N.Y.S.2d 598 (2000). However, the United States District Court for the District of Columbia, as well as courts in Arizona, Colorado, Kansas, and South Dakota have taken the opposite approach. See *Jacobsen v. Oliver,* 201 F.Supp.2d 93 (D.D.C.2002); *Elliott v. Videan,* 164 Ariz. 113, 791 P.2d 639 (1989); *Scognamillo v. Olsen,* 795 P.2d 1357 (Colo.Ct.App.1990); *227 *Hunt v. Dresie,* 241 Kan. 647, 740 P.2d 1046 (1987); *Haberer v. Rice,* 511 N.W.2d 279 (S.D.1994). The latter courts have determined that a plaintiff in a legal malpractice action may recover as compensatory damages those damages that he would have been awarded as punitive damages in the underlying action. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 353 Ill. App. 3d 197, 226–27, 817 N.E.2d 1230, 1257–58 (2d Dist. 2004), *aff'd in part, rev'd in part,* 222 Ill. 2d 218, 856 N.E.2d 389 (2006)

The appellate court, in reaching its decision finding that section 2-1115 does not act as a bar to the recovery of lost opportunity for punitive damages, reasoned:

> Consistent with the majority of courts that have considered this issue, we view the lost punitive damages in the underlying case as compensatory damages in the malpractice case. We believe the proper focus of our analysis to be what would make the plaintiff whole with respect to the defendant attorney's negligence. When, as in this case, a jury has determined that the plaintiff would have been entitled to punitive damages but for the negligence of the attorney, then such damages must

> be recoverable in order for the plaintiff to be made whole. We note that this result is consistent with the general principle in this state that "[a] legal malpractice plaintiff is entitled to recover those sums which would have been recovered if the underlying suit had been successfully prosecuted." *Weisman v. Schiller, Ducanto & Fleck,* 314 Ill.App.3d 577, 580, 248 Ill.Dec. 143, 733 N.E.2d 818 (2000). Based on (1) our view of lost punitive damages as compensatory and (2) the fact that such damages are not imposed for the purpose of punishing the attorney who commits malpractice, we hold that section 2–1115 does not bar the recovery of lost punitive damages in a legal malpractice case. *Tri-G, Inc. v. Burke, Bosselman & Weaver,* 353 Ill. App. 3d 197, 228–29, 817 N.E.2d 1230, 1259 (2d Dist. 2004), *aff'd in part, rev'd in part,* 222 Ill. 2d 218, 856 N.E.2d 389 (2006)

Before the Supreme Court, Burke argued that it was not the wanton or malicious wrongdoer, and that the actual wrongdoer in the underlying case was Elgin Federal. Burke reasoned that the Appellate Court's decision means that the malicious wrongdoer will not bear the consequences of the wrongdoing and those consequences would be shifted to the negligent attorney. Burke urged the Supreme Court to follow what it considered to be the "well- reasoned" rationale of a California case, *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP,* 30 Cal.4th 1037, 69 P.3d 965, 135 Cal.Rptr.2d 46 (2003). The Court cited extensively and approvingly from the *Ferguson* case and provided several reasons for the prohibition of recovery of lost punitive damages in legal malpractice actions:

> First, according to *Ferguson,* allowing such recovery would defeat the punitive and deterrent purposes of punitive damages because the negligent attorney in the legal malpractice action is usually not the tortfeasor who committed the intentional or malicious acts that gave rise to the punitive damages claim in the underlying case. Therefore, imposing 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. . .
>
> Second, according to *Ferguson,* allowing recovery of lost punitive damages in legal malpractice actions would violate public policy against speculative damages for several reasons. Compensatory damages in a legal malpractice action requires an objective determination. However, an award of punitive damages is an expression of the jury's moral condemnation and thus necessarily requires a moral judgment. Because moral judgments are inherently subjective, a jury assessing damages in a legal malpractice action cannot objectively determine whether punitive damages would have been awarded or the proper amount of those damages with any legal

> certainty. Also, the standards of proof for compensatory and punitive damages differ. Accordingly, the standard of proof for lost punitive damages would be a standard in a standard. This pragmatic difficulty is so complex that it militates against recovery of such damages . . .
> Lastly, as the *Ferguson* court discussed, allowing malpractice plaintiffs to recover lost punitive damages would exact a societal cost. Exposing attorneys to such liability would likely increase legal malpractice premiums, cause insurers to exclude coverage for these damages, or discourage insurers from providing professional liability insurance in the jurisdiction. This financial burden on attorneys would probably make it more difficult and costly for consumers to obtain legal services, or to obtain recovery for legal malpractice. Further, there is no compelling reason to take these risks. The recovery of lost punitive damages is not necessary to make a successful plaintiff whole in a legal malpractice action. Rather, a plaintiff is made whole by compensatory damages and punitive damages constitute an undeserved windfall. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 259–61, 856 N.E.2d 389, 413–14 (2006)

In the present matter, Midwest alleges that, but for the negligence of its attorneys, the excluded testimony and evidence would have been presented to the jury, and that had the jury heard that evidence, that jury would have not viewed the conduct of Midwest as willful, malicious or wanton. As a result, Midwest argues, the jury would not have awarded punitive damages. On the other hand, defendants argue that *Tri-G* provides the guidance this court needs to grant their Motion. Its true that reasoning of *Tri-G* provides direction for this court, but possibly not in the same way as envisioned by the defendants.

As both the *Ferguson* and the *Tri-G* cases recognize, if punitive damages are allowed in a lost punitive damages legal malpractice case, the "punitive and deterrence" purpose of punitive damages is severely eroded because there is necessarily a shift of responsibility from an allegedly willful, malicious and wanton actor to a mere negligent actor, the attorney. Thus, the societal purpose behind punitive damages would not be furthered by the imposition of punishment in the form of punitive damages. As the Supreme Court found:

> Section 2–1115 of the Code of Civil Procedure expressly bars recovery of punitive damages in a legal malpractice action. By characterizing lost punitive damages as "compensatory," Tri–G is attempting to evade reach of this statute. In our view, its efforts are ultimately unpersuasive. If the General Assembly has determined that lawyers cannot be compelled to pay punitive damages based on their own misconduct, as section 2–1115 decrees, it would be completely nonsensical to hold that they can nevertheless be compelled to pay punitive

damages attributable to the misconduct of others. Any construction of the law that permits such a result would be absurd and unjust. *Id.* 267–68,

However, in a case such as the present case, where the punitive damages are alleged to have been incurred only because of the attorney's conduct, the responsibility would shift from an allegedly innocent party to a negligent party. But, if Midwest was improperly judged due to the exclusion of exculpatory evidence in the underlying case, and it is truly innocent of the charge of willful, malicious and wanton conduct, the policy against burden shifting seemingly fails. The opposite conclusion would mean that the allegedly innocent party (e.g. Midwest) would suffer the very specific punishment of having to pay the punitive damages and would at the same time be left with no recourse for compensation. Certainly, no societal purpose is served by such a doctrine. So, the Supreme Court's concern expressed in *Tri-G* regarding the deterrence purpose of punitive damages in lost punitive damage cases seems inapplicable in cases where the negligence of an attorney results in the imposition of punitive damages against his client.

The concern expressed in *Ferguson* and *Tri-G* regarding the speculative nature of lost punitive damage mitigates against, in some respects, allowing a claim for recovery of incurred punitive damages in this case. As with many legal negligence cases, problems with proof can be daunting. To succeed, Midwest will be required to prove two cases - - "a case within a case". Not only must the Plaintiff prove negligence on the part of its attorneys, it must also prove that it was that negligence that caused the jury to reach the conclusion that Midwest's conduct was willful and wanton. It is quite speculative for one jury to decide what another jury would have done had it heard the excluded evidence. It seems even more an invitation for speculation to ask a jury to decide whether the evidence, had it not been excluded, would have led the first jury to award a lesser or no amount in punitive damages. With lost punitive damage cases, this reasoning seems sound. In cases, such as the one at hand, however, and particularly where the punitive damage is in a specific amount and liquidated, that reasoning loses traction.

Much of the proofs required to be made in the search for a recovery of incurred punitive damages are already accounted for in proving the claim for traditional compensatory damages. In its quest for traditional compensatory damages, Midwest will be required to prove that, had its attorneys not been negligent, the jury would have not found in favor of Paul Crane. If the jury in this matter finds that the defendants were negligent and that their negligence caused the first jury to find in favor of Paul Crane for his compensatory damages, it seemingly follows that it could

also find that that same negligence caused Midwest to lose on the issue of punitive damages. Thus, success or failure of the claim for recovery of incurred punitive damages is largely co-extensive with the claim for traditional compensatory damages. Therefore, proofs for the recovery of incurred punitive damages, unlike the lost opportunity to recover punitive damages, are no more speculative than proofs for the recovery of traditional compensatory damages. Moreover, because of the difference in the level of conduct necessary for an award of compensatory versus punitive damages, it seems inconsistent to say that there are higher difficulties of proof for the latter than the former in incurred punitive damage cases. Courts regularly call upon juries to make this determination in an environment of uncertainty in legal malpractice cases involving only traditional compensatory damages. This Court discerns no reason why a jury cannot be called upon to venture into that same realm when deciding whether to award the Plaintiff for *all* the amounts it incurred as a result of the verdict in the underlying matter.

The *Ferguson* Court also concerned itself with the societal cost of allowing the recovery of lost punitive damages. Those same public burdens – increased insurance costs and decreased availability of insurance coverage for legal negligence claims – would likely also follow if recovery of incurred punitive damages is deemed allowed. But, unlike cases involving the loss of the opportunity to recover punitive damages, the plaintiff here would not be "made whole by [traditional] compensatory damages" alone, nor would recovery for the punitive damages it should not have been adjudged to pay constitute an "undeserved windfall". Here, the Plaintiff was allegedly damaged when it was ordered to pay out a specific amount of money as punitive damages that it claims it would not have had to pay "but for" the negligence of its attorneys. Any recovery would serve to compensate Midwest for their actual and out-of-pocket losses if, indeed, Midwest meets its burden of proof.

So, it appears that the unique characteristics associated with legal negligence claims for lost punitive damages, and for which the Illinois Supreme Court and the *Ferguson* Court expressed concern, do not necessarily attend legal negligence claims for the recovery of paid or incurred punitive damages. Absent those unique characteristics, it seems to this court that there is exists no just reason to deny the plaintiff in this case the opportunity to recover its actual loss. It should be remembered that "[t]he general rule of damages in a tort action is that the wrongdoer is liable for all injuries resulting directly from the wrongful acts * * *, provided the particular damages are the legal and natural consequences of the wrongful act imputed to the defendant, and are such as

might reasonably have been anticipated. Remote, contingent, or speculative damages do not fall within this general rule." *Haudrich v Howmedica, Inc* 169 Ill. 2d 525, 543 (1996)

Conclusion:

This court recognizes that this issue is one of first impression and, in the thoughtful words of Chief Justice Karmeier, one on which "reasonable minds can certainly disagree." *Tri-G* at 266. Ultimately, the question will be answered by those of a higher calling through the application of pronounced public policy and sound statutory construction. For now, this court finds punitive damages that are erroneously assessed against a litigant as a proximate result of the professional negligence of its attorney are not punitive in nature but are, instead, compensatory in nature and are not barred from recovery by 735 ILCS 5/2-1115.

Defendants' Motion to Dismiss and Strike is hereby DENIED. Defendants are directed to answer or otherwise plead to the Amended Complaint within twenty-one (21) days hereof. Matter is set for CMC for August 21, 2019.

IT IS SO ORDERED. *Clerk to send copies of this order to the parties of record.*

Entered: 6-3-19

Circuit Judge David W. Dugan

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

MIDWEST SANITARY SERVICE, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	**NO. 18-L-811**
	)	
SANDBERG, PHOENIX & VON GONTARD, P.C., ET AL.,	)	
	)	
Defendants.	)	

ORDER

Cause comes before this Court on the Defendants' Motion for Certification Pursuant to Supreme Court Rule 308, and being fully advised in the premises, the Court hereby grants said Motion for Supreme Court Rule 308 Certification, finding as follows:

1. The Court's Order of June 3, 2019, which denied the Defendants' Motion to Dismiss and Strike, involves a question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from that Order may materially advance the ultimate termination of the litigation. The question certified is as follows:

> Does Illinois' public policy on punitive damages and/or 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?

2. An immediate appeal of the June 3, 2019 Order may materially advance the ultimate termination of the litigation because the punitive damages at issue comprised the bulk of the damages that were awarded in the underlying case, and the early determination of the issue above will therefore likely determine whether the case can be resolved without the need for a trial. Further, an immediate appeal will promote judicial economy as this action is still in its early stages of litigation.

SO ORDERED on this 8 day of August, 2019.

Circuit Judge David W. Dugan

MIDWEST SANITARY SERVICE,	)
NANCY DONOVAN, and	)
BOB EVANS, SR.,	)
	)
Plaintiffs-Respondents,	)
	)
-vs-	)
	)
SANDBERG, PHOENIX &	)
VON GONTARD, P.C.,	)
JOHN GILBERT, and	)
NARCISA SYMANK,	)
	)
Defendants-Applicants.	)
	)
	)

CONTENTS OF THE SUPPORTING RECORD