



Alerts

Illinois Supreme Court Holds Former Client Alleging Legal Malpractice May Recover Punitive Damages Awarded Against it in Underlying Case

September 30, 2022

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Midwest Sanitary Service, Inc., et al. v. Sandberg, Phoenix & Von Gontard, P.C. et al., 2022 IL 127327 (Sept. 22, 2022)

Brief Summary

The Illinois Supreme Court held that defendants' former client can seek to recover the punitive damages it had to pay after a judgment for such damages was entered against it (as a defendant in an underlying suit), as part of the claimed compensatory damages sought in a legal malpractice action against defendants.

Complete Summary

Plaintiffs, Midwest Sanitary Service, Inc. (Midwest) and other individuals associated with Midwest, filed a legal malpractice action against defendants arising out of their prior representation of Midwest in an underlying case. The plaintiff in that underlying case had alleged a claim of retaliatory discharge. Midwest's complaint sought reimbursement for the punitive damages Midwest paid after a judgment was entered against them in the underlying suit. Midwest alleged that but for the defendants' professional negligence, it would not have had to pay the damages awarded, including the punitive damages.

The underlying complaint alleged that Midwest discharged an employee in retaliation after he reported numerous health and safety violations. After a jury trial, the former employee was awarded \$160,000 in compensatory damages and \$625,000 in punitive damages against Midwest. Shortly thereafter, Midwest sued defendants alleging they: (1) failed to list all witnesses in compliance with Illinois Supreme Court Rule 213(f), which resulted in six witnesses for Midwest being barred from testifying, (2) failed to disclose a voicemail from a Midwest customer as a lost or destroyed document resulting in a missing evidence instruction, (3) failed to object to the language of the limiting instruction regarding the testimony of defense witnesses about that voicemail or tendering an alternative instruction, both of which forfeited appellate arguments, (4) elicited testimony during the cross-examination of an investigator wherein he disclosed that he referred Midwest to the Attorney General's office for prosecution and that the Attorney General had accepted the case, and (5) failed

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and refused to discuss potential settlement with opposing counsel without discussion or informing Midwest.

Defendants filed a motion to dismiss, arguing that Midwest's request for punitive damages violated Section 2-1115 of the Illinois Code of Civil Procedure and public policy. The trial court denied the motion but certified the following question for immediate appeal pursuant to Illinois Supreme Court 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?"

The appellate court answered the question in the negative and affirmed the judgment of the trial court. The Illinois Supreme Court allowed the defendants' petition for leave to appeal. The court initially noted that the legal malpractice action had not yet gone to trial. The court then considered the certified question of whether Illinois's public policy and/or the statutory prohibition on punitive damages barred the recovery of incurred punitive damages in a legal malpractice action where the client alleges that but for the attorney's negligence, the jury would have returned a verdict awarding either no punitive damages or damages in a lesser sum.

Section 2-1115 provides, in part, "In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal ...malpractice, no punitive ... damages shall be allowed." 735 ILCS 5/2-1115. The court found that "the punitive damages Midwest paid in the underlying retaliatory discharge action are an element of compensatory damages in the legal malpractice action because they do not punish the attorneys but instead replace the loss caused by the attorneys' alleged misfeasance or nonfeasance."

The court distinguished this case from other malpractice cases which had barred the recovery of lost punitive damages where plaintiff was a plaintiff in the underlying case seeking the punitive damages. *See, e.g., Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 226 (2006) (lost punitive damages could not be recovered in legal malpractice actions for several reasons). The court noted that because Midwest paid both the compensatory and punitive damages in the underlying action, the punitive damages were not speculative, and Midwest will have no difficulty proving the damages. Also, there was no risk of societal cost because the damages in this particular case will be based on proof of the attorneys' alleged negligence being the proximate and "but for" cause of the damages actually paid. Thus, the recovery of paid punitive damages as compensatory damages in a malpractice action violates neither Section 2-1115, nor the public policy of Illinois.

Significance of Decision

This decision is significant because previously, in *Tri-G*, the Illinois Supreme Court held that lost punitive damages could not be recovered in legal malpractice actions where the plaintiff was seeking punitive damages in the underlying case. Here, Midwest was a defendant in the underlying case. If a plaintiff can prove that the punitive damages awarded in the underlying suit were a direct and proximate cause of the defendant's negligence—and not plaintiff's own wrongful conduct—then an award of punitive damages will be considered compensatory damages in the legal malpractice action.