their work to provide us with a unique trip to Napa. And of course, Peggy and David! We are blessed to have them in the ADTA family, and Peggy is simply the best! Katy and I hope to see you in Charleston soon!

# Recent Decision of Illinois Supreme Court May Chill All Defense Lawyers

**By Donald Patrick Eckler**

The Illinois Supreme Court in *Midwest Sanitary Service, Inc. v. Sandberg, Phoenix & Von Gontard, P.C.*, 2022 IL 127327, has held that civil defense lawyers whose negligence causes their client to be liable for punitive damages are subject to those damages being sought in a subsequent legal malpractice action as compensatory damages. In so holding, the Illinois high court has joined Kansas and Colorado in subjecting defense lawyers to this liability despite an Illinois statute, 735 ILCS 5/2-1115, that precludes lawyers from being liable for punitive damages and a prior holding, *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 226 (2006), where the same court held that civil plaintiffs' lawyers are not subject to the recovery of punitive damages in a later legal malpractice action that are not able to be obtained because of the lawyer's negligence.

The court held that the punitive damages assessed against Midwest Sanitary in the underlying matter as a result of their former lawyers' alleged negligence are compensatory damages flowing from that negligence, not punitive damages against the lawyers. In coming to this conclusion, the court answered the following certified question in the negative:

> 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?

This decision has essentially created two classes of lawyers: those that represent plaintiffs against whom unrecovered punitive damages cannot be obtained and defense lawyers who are now in the position of insuring their clients against the assessment of punitive damages and are subject to the recovery of those assessed punitive damages on a finding of mere negligence by the defense lawyer.

The *Tri-G* court supported its conclusion to bar such damages being sought against plaintiffs' counsel stating "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." The *Midwest Sanitary* court came to a contrary conclusion and resolved this inconsistency by finding the total award in the underlying case, punitive damages and all, compensatory in nature. The court did not address the result of this decision which is to turn the merely negligent defense lawyer into the insurer of their client who committed conduct that was so egregious that it was found by a jury to require punishment and the imposition of punitive damages. The court also ignored its own holding in *Tri-G*, where it rejected the bundling of punitive damages with compensatory damages in a subsequent legal malpractice action:

> Section 2-1115 of the Code of Civil Procedure (735 ILCS 5/2-1115 (West 2002)) 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.

Though there is no national consensus among the courts on this issue, the weight of authority outside of Illinois supports the contrary position to that taken by the Illinois Supreme Court. Comment h to Section 53 of the Restatement (Third) of the Law Governing Lawyers (2000), which was cited by the *Tri-G* court states:

> Whether punitive damages are recoverable in a legal-malpractice action depends on the jurisdiction's generally applicable law. Punitive damages are generally permitted only on a

showing of intentional or reckless misconduct by a defendant.

A few decisions allow a plaintiff to recover from a lawyer punitive damages that would have been recovered from the defendant in an underlying action but for the lawyer's misconduct. However, such recovery is not required by the punitive and deterrent purposes of punitive damages. Collecting punitive damages from the lawyer will neither punish nor deter the original tortfeasor and calls for a speculative reconstruction of a hypothetical jury's reaction.

In *Tri-G*, the Illinois high court recognized the problems with putting that burden on plaintiffs' lawyers and stated "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."

However, in *Midwest Sanitary*, the court brushed aside this concern stating "there is no risk of a societal cost—potentially subjecting attorneys to a greater financial liability or consumers running the risk of not being able to obtain legal services or obtain recovery from legal malpractice— because the damages recoverable in this case are based on (1) proof of the attorneys' negligent acts and (2) the attorneys' negligence being the proximate cause of the damages actually paid." This, of course, ignores that lawyers may not be willing to take on cases where substantial punitive damages are in play, whether they can get insurance or not, and given the rise of nuclear verdicts, often accompanied by substantial punitive damage awards, insurance premiums are sure to rise. This will make it difficult for defendants to find lawyers who are willing and able to take on matters where there is such potential exposure.

Notwithstanding the court's conclusion that this will not impact broader concerns of availability of defense counsel and liability insurance premiums, the reality is likely different as lawyers will have to take these matters into consideration. Prior to *Tri-G*, Illinois defense lawyers were largely confident that they were not exposed to such damages given that their plaintiffs' attorney brethren were not, but that is no longer the situation.

Few, if any, states have the kind of statutory protection that Illinois lawyers have in the form of insulation from punitive damages and despite that, and despite a holding shielding plaintiffs' attorneys from the mirror image of this kind of claim, Illinois defense lawyers are now subject to this liability. Given this development, it is critical that defense lawyers, whether they are in Illinois or not, take this exposure into account when evaluating the risks of the kinds of cases that they take on and obtaining proper professional liability insurance coverage. This is a consideration because it is likely that given the Illinois Supreme Court decision, plaintiffs' lawyers may try to seek these damages in other cases against defense lawyers accused of malpractice. Defense lawyers will need to review their policies to ensure they have coverage for these kinds of damages, so that in the event of a verdict that includes punitive damages where they are accused of malpractice, they are covered.

Additional prophylactic efforts will need to be taken by defense counsel in cases where punitive damages are sought to make sure the alleged kinds of errors that were alleged to have been made by the defense lawyers in *Midwest Sanitary* are not made. Those allegations of professional negligence included failing to preserve evidence and failing to properly object or submit an alternative limiting instruction regarding the missing evidence, failing to name witnesses that could have rebutted the plaintiff's claims resulting in six witnesses being barred. The mistakes allegedly made by the defense lawyers, if true, would surely seem to support a finding of negligence, but nothing resembling conduct that would support the imposition of punitive damages.

In the end, it was the legal malpractice plaintiff, Midwest Sanitary, that committed the conduct that led to the imposition of punitive damages against it in the underlying matter (the causal relationship between the professional negligence and the imposition of damages was not before the court on the certified question), but it is the defense lawyers who have agreed to settle the matter following the decision of the Illinois Supreme Court. Defense lawyers are wise to heed the lesson of this case and adjust their practice accordingly.