

1986

Marlin L. Stewart and Candice Stewart v. Aldine J Coffman JR, Penelope Dalton Coffman, Coffman, Coffman and Woods : Reply Brief

Utah Court of Appeals

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Paul W. Mortensen; Attorney for Appellant.

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Timothy M. Shea
Clerk of the Court
Utah Court of Appeals

LIST OF PARTIES

At the time of preparation of this brief the parties to this action are the same as those listed in the caption, except that Kenneth A. Okasaki has been voluntarily dismissed from the action. This appeal only directly involves the Plaintiffs and the Defendant Penelope Dalton Coffman who was dismissed from the action over the Plaintiffs' objection.

The Defendants Aldine J. Coffman, Jr. and Coffman, Coffman and Woods, a professional corporation, who are not parties to this appeal, are represented by Tim Dalton Dunn and Anne Swensen who also represent the Defendant-Respondent Penelope Dalton Coffman in this appeal.

The Defendant Anthony M. Thurber, who is not a party to this appeal, is represented by Thomas L. Kay, P.O. Box 45385, Salt Lake City, Utah 84145-0385, (801) 532-1500.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

MARLIN L. STEWART and CANDICE STEWART, husband and wife,	:	
	:	
Plaintiffs-Appellants,	:	Case No. 860318-CA
	:	(originally No. 860167
vs.	:	in Supreme Court)
	:	
ALDINE J. COFFMAN, JR.,	:	Category No. 13.b.
<u>PENELOPE DALTON COFFMAN,</u>	:	
COFFMAN, COFFMAN and Woods, a	:	
professional corporation also	:	
known as COFFMAN and COFFMAN,	:	
ANTHONY M. THURBER, and	:	
KENNETH A. OKAZAKI, jointly	:	
and severally,	:	
	:	
Defendants.	:	
	:	
(PENELOPE DALTON COFFMAN,	:	
Defendant-Respondent)	:	

APPELLANT'S REPLY BRIEF

ARGUMENT

MEMBERS OF LAW FIRMS INCORPORATED UNDER THE UTAH PROFESSIONAL CORPORATION ACT ARE VICARIOUSLY LIABLE FOR THE ACTIONS OF OTHER MEMBERS OF THE CORPORATION EVEN ABSENT PERSONAL INVOLVEMENT IN THE REPRESENTATION OF A CLIENT

The Respondent's and Amicus Curiae's (Utah State Bar Association's) arguments rest on the assumption that the practice of law is just another business which is subject to regulation by the legislature. Such assumption is invalid. Even if, arguendo,

the legislature's clear statement in Section 16-11-10 of the Professional Corporation Act is turned on its head to wrongly divine an intention by the legislature to alter the professional relationship between clients and law firms, such an interpretation assumes an unconstitutional exercise of power by the legislature. The power of regulating the professional conduct of attorneys rests with the Supreme Court, not the legislature. In Re Disciplinary Action of McCune, Utah, 717 P.2d 701, 704-5 (1986); First Bank & Trust Co. v. Zagoria, 250 Ga 844, 302 SE2d 674 (1983). Article VIII, Section 1 of the pre-1985 Utah Constitution conferred and the current Article VIII, Section 4 of the Constitution confers the power of regulating the practice of law on the Supreme Court. In Re Disciplinary Action of McCune, supra, p.704. The legislature has no power to alter the professional relationship between clients and law firms who represent them and the Professional Corporation Act should not be interpreted to find such an abuse of power by the legislature unless the Court is willing to also declare the act unconstitutional.

In Zagoria, supra, the Georgia Supreme Court stated:

We do not view this case as one in which we need to interpret the statute providing for the creation and operation of professional corporations. We rather view this case as one which calls for the exercise of this court's authority to regulate the practice of law. This court has the authority and in fact the duty to

regulate the law practice and in the past two decades we have been diligent in our exercise of this duty.... The diligence of this court has been directed toward the assurance that the law practice will be a professional service and not simply a commercial enterprise. The primary distinction is that a profession is a calling which demands adherence to the public interest as the foremost obligation of the practitioner. The professional corporation statute should be interpreted with this thought in mind. The legislature has the clear right to enact technical rules for the creation and operation of professional corporation, but it cannot constitutionally cross the gulf separating the branches of government by imposing regulations upon the practice of law.

Zagoria, supra, p. 553.

Once the high ethical duties inherent in the practice of law are brought into consideration the appropriate decision in this case becomes clear. The legislature has no power to ignore, and the Supreme Court is charged with the high duty to assure, the highest integrity of the practice of law. The practice of law cannot tolerate a double standard of liability between attorneys who practice law by traditional partnership and those who choose to operate their partnerships as "professional corporations". Zagoria, supra, p. 555.

As stated by the Court in Zagoria,

When a client engages the services of a lawyer the client has the right to expect the fidelity of other members of the firm. It is inappropriate for the lawyer to be able to play hide-and-seek in the shadows and folds of the corporate veil and thus escape the responsibilities of professionalism.

Zagoria, supra, p. 554.

While the brief of Amicus Curiae alleges that under its proposed holding the professional corporation would be at hand to answer for the malpractice of a shareholder, such a "surety" would prove vaporous after the "hide-and-seek" methods available to professional corporations to avoid liability have been employed. One can readily foresee "professional corporations" wherein profit sharing occurs but each "shareholder" privately owns a different reporting system, his own computer, copier and other equipment and the corporation itself owns no physical assets subject to levy. Lawyers will enjoy the benefit of shared profits without the risk of losses and rightly retain the public image of a privileged class.

The suggestion of the availability of malpractice insurance to protect clients is no more than an invalid assumption that lawyers, whether they play hide-and-seek with their assets or not, will always be able to afford to purchase and will always purchase a policy which will fully cover every mishap. The Amicus Curiae is most capable of briefing this court on the current and real problems regarding insurance affordability and availability.

Simply put, shareholders in professional corporations are not the same as shareholders in business corporations. Lawyers in professional corporations are professionals who intimately

work with each other and, even if not actively assigned to a case, are available to share work product and offer advice on a point of law when asked. Under the result proposed by Respondent and Amicus Curiae, one can foresee shareholders who are, in fact, participating in a case, not listing themselves as co-counsel and lurking in the shadows so as to not be detected by a potentially aggrieved client. The public thus becomes the victim of a game of hide-and-seek enjoyed by a class which, while ostensibly burdened with high duties to the public, in fact enjoys high privileges at the expense of the public.

The public deserves more from the legal profession than is being offered by the Respondent and the Amicus Curiae. This court should hold that the Professional Corporation Act and the Utah State Constitution require that the trial court's decision be reversed.

CONCLUSION

The trial court's judgment must be reversed.

Respectfully submitted this 14 day of July, 1987.


PAUL W. MORTENSEN
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CERTIFICATE OF SERVICE

Served the foregoing Appellant's Reply Brief this 15 day of July, 1987, by mailing four copies thereof, postage prepaid, to the following:

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