

1988

Malin L. Stewart and Candice Stewart v. Aldine J. Coffman, Penelope Dalton Coffman, Coffman, Coffman, and Woods, Anthony M. Thurber, and Aaron F. Jepson : Brief in Opposition to Certiorari

Utah Supreme Court

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BRIEF

DOCUMENT

IN THE SUPREME COURT OF THE STATE OF UTAH
880071

MARLIN L. STEWART and CANDICE
STEWART, husband and wife,

Plaintiffs-Appellants,

v.

ALDINE J. COFFMAN, JR.; PENELOPE
DALTON COFFMAN; COFFMAN,
COFFMAN & WOODS, a professional
corporation a/k/a as Coffman & Coffman;
ANTHONY M. THURBER, and ARRON
F. JEPSON, jointly and severally,

Defendants.

(PENELOPE DALTON COFFMAN,
Defendant-Respondent)

Certiorari No. 880071

Category No. 13

(Case No. 860318-CA in
Court of Appeals;
originally No. 860167
in Utah Supreme Court)

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

FROM DECISION OF THE UTAH COURT OF APPEALS UPHOLDING
JUDGMENT BY THE SEVENTH JUDICIAL DISTRICT COURT OF
GRAND COUNTY, STATE OF UTAH
HONORABLE BOYD BUNNELL
DISTRICT JUDGE

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880071

LIST OF PARTIES

At the time of preparation of this Reply the parties to this action are the same as those listed on the caption except as noted below. This appeal only directly involves the Plaintiffs and the Defendant Penelope Dalton Coffman who was dismissed from the action.

The Defendant Anthony M. Thurber, who is not a party to this appeal, is represented by Thomas L. Kay, P.O. Box 45305, Salt Lake City, Utah 04145-0305.

The Defendant Kenneth A. Okazaki has been voluntarily dismissed from the action and is not a party to this appeal.

Arron F. Jepson, who is not a party to this appeal, is represented by D. Gary Christian, City Center I, Suite 330, 175 East 400 South 84111-2314.

Stephen R. Madsen, who is not a party to this appeal, has been added as a defendant to the action in the district court but has not yet been served or appeared herein.

Donald E. Elkins, who is not a party to this appeal, has been added as a defendant to the action in the district court and has appeared pro se and also as counsel for the partnership of Madsen, Jepson & Elkins which has also been added as a defendant in the district court and is not a party to this appeal. Mr. Elkin's address is 60 East 100 South, Suite 200, Provo, Utah 84601.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STEWART, husband and wife,

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originally No. 860167
in Utah Supreme Court)

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

The above Defendant-Respondent hereby petitions the Utah Supreme Court to refuse certiorari to review the Decision of the Utah Court of Appeals in the above matter dated and filed January 12, 1988, appeal No. 860318-CA.

1. QUESTION PRESENTED FOR REVIEW. The sole issue on appeal is whether a shareholder of a law firm organized under the Utah Professional Corporation Act is vicariously liable for the acts or omissions of another shareholder of the firm. Petitioners seek a certiorari for review of the opinion of the Utah Court of Appeals which upheld the decision of the Seventh Judicial District Court of Grand County in dismissing Penelope Dalton Coffman (Penelope), a shareholder of an incorporated law firm, from the above action. The Respondents submit that the decision of the Court of Appeals fully considered and addressed the professional aspects of the practice of law, holdings by the courts of other States, the legislative history and intent of the Professional Corporation Act, and the

implications of the its decision in its decision and its review of Petitioners' Petition for Rehearing.

2. REFERENCE TO OFFICIAL REPORT AND UNOFFICIAL REPORTS OF OPINION ISSUED BY THE COURT OF APPEALS. The Court of Appeals issued its written opinion on January 12, 1988. Rehearing was denied by order dated January 27, 1988. The opinion has reported in 73 Utah Advance Reports at page 119.

3. STATEMENT OF GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED. This is an appeal from a final judgment of the Seventh Judicial District Court for Grand County. The appeal was originally to the Supreme Court (No. 060167) but was transferred to the Court of Appeals. Review of the decision of the Court of Appeals is now sought through Petitioners' Petition for Certiorari.

(a) The Date Of Entry Of Decision Sought To Be Reviewed: The decision sought to be reviewed was dated and entered on January 12, 1988.

(b) The Date Of The Entry Of Order Respecting Rehearing: The Court of Appeals' order denying the Plaintiffs' petition for rehearing was entered on January 27, 1988.

(c) The Statutory Provision Believed To Confer On Supreme Court Jurisdiction To Review The Decision In Question By A Writ Of Certiorari: Section 78-2-2(3) (a) of the Utah Code Annotated provides the Supreme Court with appellate jurisdiction over a judgment of the Court of Appeals. Additionally, Section 78-2-2(2) provides the Supreme Court with original jurisdiction to issue extraordinary writs. See Also Rule 46 and Rule 47 of the Rules of the Supreme Court.

4. CONTROLLING PROVISIONS OF CONSTITUTIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED.

Utah State Constitution, Article VIII, Section 4 (Effective July 1, 1985):

. . . The supreme court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

The Utah Professional Corporation Act, Section 16-11-1 et seq.

16-11-3. Purpose of act.--This act shall be so construed as to effectuate its general purpose of making available to professional persons the benefits of the corporate form for the business aspects of their practices while preserving the established professional aspects of the personal relationship between the professional person and those he serves.

16-11-10. Laws as to professional relationships not altered.--This act does not alter any law applicable to the relationship between a person rendering professional services and a person receiving such services, including liability arising out of such professional services.

16-11-5. Application of Utah Business Corporation Act -
- Conflicts. The Utah Business Corporation Act shall be applicable to professional corporations, and they shall enjoy the powers and privileges and be subject to the duties, restrictions and liabilities of other corporations, except where inconsistent with this act. This act shall take precedence in the event of any conflict with the provisions of the Utah Business Corporation Act or other laws.

Rule 1.8(h) of the Rules of Professional Conduct:

A lawyer shall not make an agreement prospectively limiting the lawyers liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement ...

Rule 5.1 of the Rules of Professional Conduct:

(a) A partner in a law firm shall make reasonable efforts to insure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of professional Conduct.

(b) . . . A lawyer shall be responsible for another lawyer's violations of the Rules of professional Conduct if:
. . . (2) The lawyer is a partner in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment to Rule 5.1 of Rules of Professional Conduct:

Apart from this Rule and Rule 8.4 (a), a lawyer does not have disciplinary liability for the conduct of partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

5. STATEMENT OF THE CASE.

Nature of the Case

This is a legal malpractice case. Plaintiffs appealed to the Utah Supreme Court from a final dismissal which dismissed defendant Penelope Dalton Coffman (Penelope) from the action brought by the Plaintiffs in the Seventh Judicial District Court of Grand County against several attorneys including defendants Penelope and Aldine J. Coffman, Jr. (Aldine). The case was transferred to the Court of Appeals which upheld the district court's dismissal of Penelope; and rejected a later Petition for Rehearing.

Statement of Facts

At the time the suit was filed, Penelope and Aldine were members of Coffman, Coffman and Woods, a professional corporation. Penelope filed a motion to dismiss herself as a defendant for failure of plaintiffs to state a cause of action upon which relief could be granted. The motion was denied because there were "no facts presented from which the Court can find as a matter of undisputed fact that this Defendant, contrary to the allegations of the Complaint, had not (sic) personal involvement in the matters alleged." (R. 30-58). Subsequently Penelope filed a motion to reconsider supported by her affidavit (R. 59-61; 70-71) in which she stated:

2. Affiant is a member of the law firm Coffman, Coffman (and) Woods.

3. The law firm Coffman, Coffman (and) Woods is a professional corporation.

4. Affiant has not at any time undertaken to represent (plaintiffs) in an matter.

5. Affiant has not corresponded at any time with the (plaintiffs), or either of them, with regard to any legal matter.

6. Prior to the filing of this lawsuit, affiant never saw the file, never knew the contents of the file, never discussed with any other member of the lawfirm (sic) the contents of the file, and cannot contribute any information through discovery, having no personal (knowledge) of any of the events leading up to the filing of this lawsuit.

The motion to dismiss was granted. (R. 72-74; 135-137).

In Judge Bunell's order of dismissal, the trial court stated that the undisputed facts showed that Coffman, Coffman and Woods was a P.C. and "although (Penelope), is a member of that corporation, she had no personal or professional involvement in the matters alleged in plaintiffs' Complaint, the Court concluded as a matter of law from those undisputed facts that there is no cause of action against (Penelope)." The Court's judgment as to Penelope was ordered final pursuant to Rule 54(b) URCP. (R. 144-6). The appeal process then commenced, resulting in the opinion of the Court of Appeals upholding the trial court's decision.

It should be noted that the underlying liability lawsuit is proceeding against Aldine J. Coffman, Jr., Coffman, Coffman and Woods, a professional corporation a/k/a as Coffman and Coffman.

ARGUMENT AGAINST ISSUANCE OF THE WRIT

POINT I

THE UTAH PROFESSIONAL CORPORATION ACT CONTAINS NO PROVISION FOR VICARIOUS LIABILITY AND NO MEMBER OF A CORPORATION CAN BE CHARGED WITH LIABILITY FOR THE ACTS OF ANOTHER MEMBER OF THE CORPORATION ABSENT PERSONAL INVOLVEMENT IN THE REPRESENTATION OF A CLIENT.

Penelope D. Coffman and Aldine J. Coffman, Jr. are both members of the defendant law firm Coffman, Coffman and Woods, a professional corporation. Aldine J. Coffman has rendered services to the Appellants. Penelope D. Coffman has rendered no services to Appellants; nor has she been in anyway involved in the services rendered by Aldine J. Coffman.

The laws governing the members of a professional corporation are found in the Utah Professional Corporation Act, Utah Code Ann. section 16-11-1 to 16-11-15 (1978). The Utah General Partnership Act is not applicable to a professional corporation.

Appellants cite section 16-11-3 and 16-11-10 from the Professional Corporation Act allowing professionals the use of the corporation form for business purposes, while not altering the professional relationship between the professional and his client. The language of the Statute, however, specifically states that the act "does not alter any law applicable to the relationship between a person rendering professional services and a person receiving such services, including liability arising out of such professional services." (emphasis added) There is no mention of a relationship with or liability of, other members of a corporation. The emphasis is on liability of a person rendering professional services to a person that receives such services.

In a case dealing with the issue of vicarious liability among members of a professional corporation, the Nevada Supreme Court stated:

A member of professional legal corporation in Nevada is not individually liable for the tortious acts of other members of that professional legal corporation unless he/she personally participated in those tortious acts. Grayson v. Jones, 710 P.2d 76 (Nev. 1985)

It is a fact that of this case that Penelope D. Coffman did not in any sense of the definition personally participate in the representation of the appellants. 18 AM JUR 2d Section 27 and 18 AM JUR 2d Section 854 affirm the law that while the liability between an attorney and his client remains the same in a professional corporation, vicarious liability is not imposed on a shareholder.

Section 16-11-5 of the Professional Corporation Act reads as follows:

The Utah Business Corporation Act shall be applicable to professional corporations, and they shall enjoy the powers of privileges and be subject to the duties, restrictions and liabilities of other corporations, except where inconsistent with this act.

The Utah Business Corporation Act, which is applicable to the Utah Professional Corporation Act, provides that shareholders are under no obligation to the corporation or its creditors other than the obligation to pay full consideration for shares issued. Utah Code

Ann. Section 16-10-23 (1978). The Colorado Supreme Court has ruled accordingly in giving a professional corporation the same powers and privileges that a business corporation enjoys. The court states "a professional service corporation enjoys all powers and privileges of other corporations, under Colorado law." Network Affiliates v. Robert E. Schack, P.A., 682 P.2d 1244, 1246 (Colo. App. 1984).

The general law of corporations provides that corporate officers are jointly and severally liable only when two or more join or participate in a wrongful act. Directors are not liable for the wrongful acts of their co-directors if they do not connive with them, nor are the executive officers responsible for the neglect of duty, negligence, or misconduct of each other in their official relations, without proof of joint participation. 18 B AM JUR 2d Section 1719, 1720.

The Supreme Court of the State of Oregon in Amfac Foods, Inc. v. International Systems & Controls Corp., 294 Or. 94, 654 P.2d 1092 (1982), has provided a general interpretation of corporate law in what the Utah Court of Appeals described as a lengthy discussion concerning exceptions to shareholder immunity, and described the general rule as follows:

The question of when and under what circumstances a shareholder becomes liable for a corporate obligation has troubled judges and lawyers for a century or so. Although corporate shareholders were not insulated from liability for debts of the corporation in common law England, shareholder insulation from such liability has been a cornerstone of corporate law in the United States since the nineteenth century. Virtually every state has a statute similar to [Oregon's], which limits a shareholder's liability to the cost of the shares held.

We believe that this court should also follow this general interpretation of corporate law.

POINT II

The Court of Appeals has thoroughly examined all contentions raised by the Petitioner-Appellant including Petitioner-Appellant's contention that the Rules of Professional Conduct somehow create vicarious liability for shareholder attorneys.

The Court of Appeals, without the matter having been raised in the appellant's or respondent's Briefs below has examined the question of whether or not the Rules of Professional Conduct, effective January 1, 1988, has created vicarious liability for shareholder attorneys.

The scope section of the Rules of Professional Conduct contains this statement:

Violation of a rule should not give rise to a cause of action nor should it could create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

Accordingly nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

The Court of Appeals went on to review Rule 5.1 of the Rules of Professional Conduct (which were adopted after the facts which gave rise to the lawsuit which is the basis of this current appeal) and determined that neither Rule 5.1 nor Rule 8.4 vary from a proper interpretation of the Utah Professional Corporation Acts which underlies the basic decision of the Court of Appeals. The Court of Appeals also referred to the comment to Rule 5.1 as being "instructive." That comment reads as follows:

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

Thus it seems clear that Petitioner-Appellant's contention that the Rules of Professional Responsibility somehow apply to this situation are inaccurate and unfounded.

6. APPENDIX. An appendix is attached to the Petitioner-Appellant's Petition for Certiorari. It contains all items which might otherwise be attached as an appendix to this Brief. To avoid duplication this Respondent adopts the contents of Petitioner's Appendix. It contains the following:

Opinion of Court of Appeals.
Order denying petition for Rehearing

Affidavit of Penelope Dalton Coffman
District Court's Ruling on Motion To Reconsider Motion to
Dismiss
Legislative History


CONCLUSION

A writ of certiorari should be denied.

The Court of Appeals in the trial court decisions are well thought out and have fully reviewed the question. The decision of the trial court and the decision of the Court of Appeals are in accordance with the law as it exists in the statutes of the State of Utah and as it ought to exist. Plaintiff's retain all opportunities for legitimate recompense against the attorneys that actually worked on the legal matters in question.

Respondent respectfully submits that the writ of certiorari should not issue and that the decision of the Court of Appeals should be allowed to stand.

Respectfully submitted this 18th day of March, 1988.



TIM DALTON DUNN
Attorney for Defendant-Respondent

CERTIFICATE OF SERVICE

Served the foregoing Respondent's Brief In Opposition To Petition For Certiorari
this 18th day of March, 1988, by mailing four copies, postage prepaid, to the
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