

1988

Marlin L. Stewart, Candice Stewart v. Aldine J.
Coffman, Jr., Penelope Dalton Coffman, Coffman,
Coffman and Woods, Coffman and Coffman,
Anthony M. Thurber, Kenneth A. Okazaki :
Petition for Writ of Certiorari

Utah Supreme Court

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Tim Dalton Dunn; Hanson, Dunn, Epperson and Smith; attorney for respondent.

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Recommended Citation

Legal Brief, *Stewart v. Coffman*, No. 880071.00 (Utah Supreme Court, 1988).
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DOCKET NO. 880071

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

Plaintiffs-Appellants,

VS.

ALDINE J. COFFMAN, JR.,
PENELOPE DALTON COFFMAN,
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)

Certiorari No. _____

Category No. 13

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

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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FEB 10 1953

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LIST OF PARTIES

At the time of preparation of this Petition 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 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 who also represents 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.

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, has been added as a defendant to the action in the district court and 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

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

PETITION FOR CERTIORARI

The above Plaintiffs-Appellants hereby petition the Utah Supreme Court to review the Opinion of the Utah Court of Appeals in the above matter dated and filed January 12, 1988, appeal No. 860318-CA, copy attached.

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. The Petitioners

seek a reversal 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 Petitioners submit that the decision of the Court of Appeals failed to consider and address the professional aspects of the practice of law, contrary holdings by the courts of other States, the legislative history and intent of the Professional Corporation Act, and the constitutional implications of the its decision since the practice of law is regulated by the Supreme Court rather than the legislature.

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. 860167) but was transferred to the Court of Appeals. Review of the decision of the Court of Appeals is now sought.

(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) Reliance Upon Rule 44(c), Where A Cross-Petition For A Writ Of Certiorari Is Filed: Not applicable. This is not a cross-petition for certiorari.

(d) 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. Further, Article VIII, Section 4 of the Utah Constitution imposes upon this Court the duty to regulate the practice of law.

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

Utah State Constitution, Article VIII, Section 1 (Pre-July 1, 1985):

The Judicial power of the State shall be vested in the Senate sitting as a court of impeachment, in a Supreme Court, in district courts, in justices of the peace, and such other courts inferior to the Supreme Court as

may be established by law.

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.

Utah General Partnership Act, Utah Code Annotated 1953, as amended:

48-1-10. Partnership bound by partner's wrongful act. Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

48-1-11. Partnership bound by partner's breach of trust. The partnership is bound to make good the loss:
(1) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and,
(2) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

48-1-12. Nature of partner's liability.
All partners are liable:

(1) Jointly and severally for everything chargeable to the partnership under sections 48-1-10 and 48-1-11.
(2) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

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.

Section 68-3-12, Utah Code Annotated 1953, as amended:

(5) "Person" includes individuals, bodies politic and corporate, partnerships, associations, and companies.

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

A lawyer shall not make an agreement prospectively limiting the lawyer's 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 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.

Terminology section of Rules of Professional Practice:

"Partner" denotes a member of a partnership or a shareholder in a law firm organized as a professional corporation."

Legislative History. (Set forth in Appendix).

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.

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 its 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 (sic) 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.

ARGUMENT FOR ISSUANCE OF THE WRIT

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. THEREFORE, THE COURT OF APPEALS' DECISION MUST BE REVERSED

I.

THE CASE RAISES AN IMPORTANT QUESTION REGARDING THE PRACTICE OF LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court is charged under the Utah State Constitution with regulating the practice of law. In Re Disciplinary Action of McCune, Utah, 717 P.2d 701, 704-5 (1986). The issue of vicarious liability for members of professional law corporations has not been considered by this Court. The Utah Bar Association and Utah Trial Lawyers Association have in the Court of Appeals taken opposite stands as amicus curiae, showing that the issue is complex and significant. All Utah lawyers and the public they

serve are affected by this issue. Accordingly, the issue raised is an important matter which should be settled by review. The Court should exercise its discretion pursuant to Rule 43(4) of the Rules of the Utah Supreme Court and issue a writ of certiorari.

II.

THE COURT OF APPEALS DECISION FAILED TO CONSIDER THE TRADITIONAL PARTNERSHIP LIABILITY WHICH ATTACHED TO LAW FIRMS, THE LEGISLATIVE HISTORY OF THE PROFESSIONAL CORPORATION ACT AND CONFLICTING DECISIONS BY OTHER COURTS.

Aldine and Penelope are each members of the Defendant law firm Coffman, Coffman and Woods, a professional corporation. (R. 24-29; 32-34; 59-61). The professional corporation, if it in fact exists, must be incorporated under authority of the Utah Professional Corporation Act, Section 16-11-1 et seq. of the Utah Code Annotated 1953, as amended.

Prior to the adoption of the Professional Corporation Act in 1963, law firms necessarily existed in the form of partnerships subject to the liabilities imposed by partnership law. Petition of Bar Asso., 55 Hawaii 121, 516 P.2d 1267 (1973). Williams v. Burns, 463 F Supp 1278, (D.C. Colo, 1979). Sections 48-1-10, 11 and 12 of the Utah General Partnership Act, which was adopted in 1921, provided that the partnership and all partners as of the date liability arose are jointly and severally liable for the wrongful acts or omissions of any partner acting in the ordinary

course of business. Sections 16-11-3 and 10 of the Professional Corporation Act state that although the act allows professionals the use of the corporate form for business purposes, the act is not intended to alter the professional relationship between the professional and his client and specifically is not intended to alter any law of liability applicable to the relationship.

Section 16-11-3 provides that the corporate form is made available "to professional persons". "Professional persons" includes professional partnerships since Section 68-3-12(5) of the Utah Code Annotated provides that "person" in a statute shall be construed to mean partnerships and associations. The legislative history, set forth in the appendix, shows that the legislature did not intend to alter the traditional form of liability regarding law firms. Even the terminology section of Rules of Professional Practice recognize identical continuing professional responsibilities for partnership members and professional corporation members:

"Partner" denotes a member of a partnership or a shareholder in a law firm organized as a professional corporation."

Therefore, the preexisting status of law firm members being vicariously liable for the professional misdeeds of their fellow members remains applicable to members of professional corporations. In Petition of Bar Assoc., Supra, the Hawaii

Supreme Court recognized that the liability of attorneys of incorporated law firms for the malpractice of their associates should not be limited and that the partnership law of liability should continue to apply. The same result was reached in South High Development Limited v. Weyner, Lippe and Cromley Co., L.P.A., 445 N.E.2d 1106 (Ohio, 1983). In First Bank & Trust Co. v. Zagoria, 250 GA. 844, 302 SE 2d 674, (1983), 39 ALR 4th 551, on remand, Zagoria v. Du Bose Enterprises, Inc., 167 Ga App 120, 306 SE 2d 433, the Georgia Supreme Court unanimously held that a lawyer who holds himself out as a member of a law firm, whether it is a partnership or a professional corporation, is liable for the professional misconduct of other members of the firm even when the lawyer has had no involvement in the transaction which gave rise to the liability. The Court of Appeals' decision ignored this authority.

The Court of Appeals emphasized the words, "for the business aspects" when quoting Section 16-11-3 UCA. (Slip. Op. at 3). Its decision was based upon the erroneous impression that liability of law firm members to law firm clients is a business aspect of the practice of law. The statute expressly says that it is not intended "to alter any law applicable to the relationship between a person rendering professional services and a person receiving such services, including liability ...".

(Section 16-11-10, emphasis added.) Again, "person" includes partnerships (Section 68-3-12(5)) and, therefore, legal partnerships. The corporate form was intended to provide the lawyer with tax advantages (Legislative history, page 4), taxes clearly being a "business aspect" of the practice of law. While the corporate form might arguably be construed to protect law firm members from individual liability to a delivery man who slips and falls in the office lobby, or from individual liability to pay for office supplies ("business aspects" of the practice of law) it cannot be construed to limit liability relating to professional services rendered. The Court of Appeals erred in construing professional liability to be a "business aspect" of the practice of law.

III.

THE DECISION OF THE COURT OF APPEALS FAILED TO ADDRESS THE PROFESSIONAL ASPECTS OF THE PRACTICE OF LAW AND IGNORED THE UTAH CONSTITUTION'S MANDATE THAT THE PRACTICE OF LAW BE REGULATED BY THE SUPREME COURT, RATHER THAN BY THE LEGISLATURE.

The Court of Appeal's decision rests 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 incorrectly construed to find legislative intent 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 SE 2d 674, (1983), 39 ALR 4th 551, on remand, Zagoria v. Du Bose Enterprises, Inc., 167 Ga App 120, 306 SE 2d 433. 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. at page 553 of 39 ALR 4th, 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.

The court further appropriately stated:

The shareholders of a professional Corporation have the same insulation from liability as shareholders of other corporations with respect to obligations of a purely business and nonprofessional nature. However, the influence of the statute upon the professional corporation cannot extend to the regulation of the law practice so as to impose a limitation of liability for acts of malpractice obligations incurred because of a breach of a duty to a client.

The professional nature of the law practice and its obligations to the public interest require that each lawyer be civilly responsible for his professional acts. A lawyer's relationship to his client is a very special one. So also in the relationship between a lawyer and the other members of his or her firm a special one. 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.

...

We cannot allow a corporate veil to hang from the cornices of professional corporations which engage in the law practice.

id., p. 554-5.

Once the high ethical duties inherent in the practice of law are brought into consideration it becomes clear that this Court must adopt the holding of the Georgia Supreme Court. 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".

The decision of the Court of Appeals invites the "hide-and-seek" games feared by the court in Zagoria. 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. One can also foresee, as a result of the Court of Appeal's decision, 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 it receives from the decision of the Court of Appeals. This Court should issue a writ of certiorari and upon review, reverse the decision of the Court of Appeals.

IV.

THE COURT OF APPEALS DECISION FOUND THAT THE RULES OF PROFESSIONAL CONDUCT DO NOT OF THEMSELVES CREATE A BASIS OF LIABILITY. HOWEVER, ASSUMING SUCH TO BE TRUE, NEITHER DO THE RULES ABROGATE THE ESTABLISHED LAW ABOVE SET FORTH.

The Court of Appeals erroneously found that traditional principals of business corporation liability applies to lawyers' malpractice. (Slip op. at 3-4). It then stated regarding the Rules of Professional Responsibility:

Clearly the Utah Supreme Court is only concerned with potential disciplinary actions and liability. In regulating the practice of law, the Supreme Court has done nothing to change those principle of corporate law discussed earlier.

(Slip op. at 6). The Court of Appeals is at least correct in recognizing that the Rules of Professional Conduct do not abrogate existing law regarding professional liability. However, it errors in applying business corporation law where the established principals of professional liability in the legal profession have included vicarious liability as discussed above.

6. APPENDIX. An appendix is attached which 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 immediately issue. The Court of Appeals' and trial court's decisions must be reversed. In the event that the action has been tried before this appeal is reviewed, Penelope Dalton Coffman should be ordered subject to and bound by any judgment entered against Aldine J. Coffman, Jr. and/or the professional corporation.

Respectfully submitted this 15 day of February, 1988.



PAUL W. MORTENSEN
ATTORNEY FOR PLAINTIFFS-APPELLANTS

stewapp.crt

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COVER SHEET

CASE TITLE:

Marlin L. Stewart and Candice Stewart,
Husband and Wife,
Plaintiffs and Appellants,

v.

No. 860318-CA

Aldine J. Coffman, Jr., Penelope Dalton
Coffman, Coffman, Coffman and Woods,
a professional corporation also known as
Coffman and Coffman, Anthony M. Thurber,
and Kenneth A. Okazaki, jointly and severally,
Defendants and Respondent.

PARTIES:

Paul W. Mortensen (Argued)
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Tim Dalton Dunn, Esq. (Argued)
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TRIAL COURT:

Hon. Boyd Bunnell
Seventh District Court
Grand County
Dist. Ct. #5370

-o0o-

January 12, 1988 - Opinion by Judge Richard C. Davidson
Concurred: Judge Gregory K. Orme
Judge Norman H. Jackson

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered that the dismissal of the trial court be and the same is hereby affirmed. Costs against plaintiffs.

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of January, 1988, a true and correct copy of the attached opinion was mailed to each of the above parties and to the trial court.

Julia Whitfield
Case Management Clerk

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Marlin L. Stewart and Candice
Stewart, Husband and Wife,

Plaintiffs and Appellants,

v.

Aldine J. Coffman, Jr., and
Penelope Dalton Coffman,
Coffman, Coffman and Woods,
a professional corporation
also known as Coffman and
Coffman, Anthony M. Thurber,
and Kenneth A. Okazaki,
jointly and severally,

Defendants and Respondent.

OPINION
(For Publication)

Case No. 860318-CA

FILED
JAN 12 1988

Before Judges Jackson, Orme and Davidson.

U.S. District Court
District of Columbia
U.S. District Court
District of Columbia

DAVIDSON, Judge:

Plaintiffs appeal from the final judgment of dismissal which dismissed defendant Penelope Dalton Coffman (Penelope) from a legal malpractice action brought by plaintiffs against several attorneys including defendants Penelope and Aldine J. Coffman, Jr. (Aldine). We affirm.

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 matter of undisputed fact that this Defendant, contrary to the allegations of the Complaint, had not [sic] personal involvement in the matters alleged." Subsequently, Penelope filed a motion to reconsider supported by her affidavit 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 any 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. In its 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 [sic] as a matter of law from those undisputed facts that there is no cause of action against [Penelope]."

The issue on appeal is whether a shareholder of a law firm organized under the Utah Professional Corporation Act (UPCA) is vicariously liable for the acts or omissions of another shareholder of the firm.

The appropriate standard of review dictates that "we accord conclusions of law no particular deference, but review them for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

THE UTAH PROFESSIONAL CORPORATION ACT

The UPCA is delineated in Utah Code Ann. §§ 16-11-1 to -15 (1987). UPCA's purpose, is stated in § 16-11-3:

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.

(Emphasis added.) In § 16-11-10, professional relationships are specifically addressed:

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.

These sections establish that the UPCA provides the benefits of corporate status to professional corporations, but there is nothing therein which creates or extends vicarious liability to other shareholders.

The UPCA, in § 16-11-5, emphasizes that professional corporations are to be treated as other corporations:

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 provisions of the Utah Business Corporation Act or other laws.

The Oregon Supreme Court in Amfac Foods, Inc. v. International Systems & Controls Corp., 294 Or. 94, 654 P.2d 1092 (1982),

presented a lengthy discussion concerning exceptions to shareholder immunity in the context of general corporate law. However, the general rule is described 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],¹ which limits a shareholder's liability to the cost of the shares held.

Id. at 1096 (footnotes omitted). Following this general interpretation of corporate law and finding no specific justification in either the UPCA or the Utah Business Corporation Act, we hold that a shareholder in a corporation organized under the UPCA is not vicariously liable for the acts or omissions of another shareholder in the performance of professional service unless that shareholder has participated in the alleged acts or omissions.

THE RULES OF PROFESSIONAL CONDUCT

The Utah Constitution art. VIII, § 4 states "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." See In re Disciplinary Action of McCune, 717 P.2d 701, 704 n.2 (Utah 1986); Utah Code Ann. § 78-2-4(3) (1987). It is argued that the Supreme Court, by adopting the Proposed Rules of Professional Conduct, scheduled to be effective January 1, 1988, has created vicarious liability for shareholder attorneys. However, this is not the case. The Scope section of the Proposed Rules contains the following statements:

1. Utah Code Ann. § 16-10-23 (1987).

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for involving the disciplinary process.

Violation of a Rule should not give rise to a cause of action nor should it 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 Rule should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

In the Terminology section, "partner" is defined as "[denoting] a member of a partnership and a shareholder in a law firm organized as a professional corporation."

Rule 5.1 delineates the responsibilities of a partner or supervisory lawyer in law firms and associations. Rule 5.1(a) states a partner's obligation is to ensure reasonable efforts are made to be sure that all lawyers within the firm conform to the Rules. Rule 5.1(b) specifically requires supervisory lawyers to make reasonable efforts to ensure those lawyers they supervise conform to the Rules.

Rule 5.1(c) states:

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- (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.

The Comment to Rule 5.1 is also instructive. "Apart from this Rule and Rule 8.4(a),² 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." Clearly the Utah Supreme Court is only concerned with potential disciplinary actions and has specifically refrained from addressing questions of civil liability. In regulating the practice of law, the Supreme Court has done nothing to change those principles of corporate law discussed earlier.

The dismissal of the trial court is affirmed. Costs against plaintiffs.

Richard C. Davidson, Judge

WE CONCUR:

Norman H. Jackson, Judge

Gregory K. Orme, Judge

2. Rule 8.4(a): It is professional misconduct for a lawyer to: (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

IN THE UTAH STATE COURT OF APPEALS

--oOo--

Marlin L. Stewart and Candice Stewart,
Husband and Wife,
Plaintiffs and Appellants,

ORDER

v.

860318-CA

Aldine J. Coffman, Jr., Penelope Dalton
Coffman, Coffman, Coffman and Woods,
a professional corporation also known as
Coffman and Coffman, Anthony M. Thurber,
and Kenneth A. Okazaki, jointly and severally,
Defendants and Respondent.

Pursant to the Rules of the Utah Court of Appeals 3(a),
appellant's petition for rehearing is denied.

Dated this 27th day of January, 1988.

FOR THE COURT:

A handwritten signature in dark ink, appearing to read 'TM Shea', is written over a horizontal line.

Timothy M. Shea
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of January, 1988, a true and correct copy of the foregoing Petition for Rehearing was mailed to each of the following:

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Moab, UT 84532-0339

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Julia C. Whitfield
Case Management Clerk

TIM DALTON DUNN, Bar #0936
ANNE SWENSEN, Bar #4252
HANSON, DUNN, EPPERSON & SMITH
A Professional Corporation
Attorneys for Defendants
Aldine J. Coffman, Penelope Dalton Coffman
& Coffman, Coffman and Woods
650 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101
Telephone : (801) 363-7611

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR GRAND COUNTY, STATE OF UTAH

MARLIN L. STEWART and	:	
CANDICE STEWART, Husband	:	
and Wife,	:	
	:	AFFIDAVIT OF
Plaintiffs,	:	PENELOPE DALTON COFFMAN
	:	
vs.	:	Civil No.
	:	
ALDINE J. COFFMAN, JR.,	:	
PENELOPE DALTON COFFMAN,	:	
COFFMAN, COFFMAN AND WOODS,	:	
a professional corporation,	:	
a/k/a COFFMAN and COFFMAN,	:	
ANTHONY M. THURBER, and	:	
KENNETH A. OKAZAKI,	:	
jointly and severally,	:	
	:	
Defendants.	:	

STATE OF UTAH)
 : ss
GRAND COUNTY)

PENELOPE DALTON COFFMAN, being first duly sworn, on oath
deposes and says:

1. Affiant is an attorney licensed to practice law in the State of Utah.

2. Affiant is a member of the law firm Coffman, Coffman & Woods

3. The law firm Coffman, Coffman & Woods is a professional corporation.

4. Affiant has not at any time undertaken to represent Marlin L. Stewart or Candice Stewart in any matter.

5. Affiant has not corresponded at any time with the Stewarts, 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 the contents of the file, and cannot contribute any information through discovery, having no personl knowledge of any of the events leading up to the filing of this lawsuit.

DATED this 11th day of January, 1986.



PENELOPE DALTON COFFMAN

Subscribed and Sworn to before me this 16th day of
January, 1986.

Linda L. Laney
NOTARY PUBLIC

Residing at: Moab, Utah

My Commission Expires:

11-18-86

MAILING CERTIFICATE

I hereby certify that I mailed postage prepaid this
16th day of January, 1986, a true and accurate copy of the
foregoing to:

Paul W. Mortensen, Esq.
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131 East 100 South
P.O. Box 339
Moab, Utah 84532-0339

Linda L. Laney

TIM DALTON DUNN, Bar #0936
ANNE SWENSEN, Bar #4252
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A Professional Corporation
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Salt Lake City, Utah 84101
Telephone : (801) 363-7611

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR GRAND COUNTY, STATE OF UTAH

MARLIN L. STEWART and	:	
CANDICE STEWART, Husband	:	
and Wife,	:	
Plaintiffs,	:	MOTION TO RECONSIDER
vs.	:	Civil No. 5370
ALDINE J. COFFMAN, JR.,	:	
PENELOPE DALTON COFFMAN,	:	
COFFMAN, COFFMAN AND WOODS,	:	
a professional corporation,	:	
a/k/a COFFMAN and COFFMAN,	:	
ANTHONY M. THURBER, and	:	
KENNETH A. OKAZAKI,	:	
jointly and severally,	:	
Defendants.	:	

DEFENDANT PENELOPE DALTON COFFMAN moves the court to
reconsider its ruling on her Motion to Dismiss.

The court denied this defendant's Motion to Dismiss on January 15, 1986. That ruling was apparently made prior to the court's receipt of this defendant's Reply Memorandum and supporting Affidavit.

This defendant therefore respectfully requests that the court reconsider its Motion to Dismiss, including the Reply Memorandum and Affidavit currently on file herein.

DATED this 22 day of January, 1986.

HANSON, DUNN, EPPERSON & SMITH

/s/
ANNE SWENSEN

MAILING CERTIFICATE

I hereby certify that I mailed postage prepaid this 23rd day of January, 1986, a true and accurate copy of the foregoing to:

Paul W. Mortensen, Esq.
Attorney for Plaintiffs
131 East 100 South
P.O. Box 339
Moab, Utah 84532-0339

Karen Marie Clark

HOUSE BILL 197
INCORPORATION OF PERSONS
RENDERING PROFESSIONAL SERVICES

Sponsors: Reed A. Watkins, Eighth District
J. Robert Bullock, Eleventh District
George R. Aiken, Twenty-Sixth District

BILL SIGNED BY THE GOVERNOR MARCH 19, 1963

HOUSE OF REPRESENTATIVES DEBATE, THIRD DISCUSSION

MR. SPEAKER: To incorporate for tax
benefits (inaudible) Representative Watkins?

REPRESENTATIVE WATKINS: I move we accept the
Committee report.

UNIDENTIFIED SPEAKER: Seconded.

SPEAKER: Thank you. It has been moved and
seconded we adopt the Committee report. All in favor of this
motion, say Aye.

UNIDENTIFIED SPEAKERS: Aye.

MR. SPEAKER: Cause in all? The ayes have it.
It is now before us for consideration and explanation by
Representative Watkins. Will you proceed?

REPRESENTATIVE WATKINS: Mr. Speaker and members
of the House. It is well known that employees of
corporations receive some definite tax benefits under our
federal law. And through the years individuals who have
operated sole proprietorships have been able to form

1 corporations and in effect become employees of their own
2 corporation, so that they too may participate along with the
3 rest of their employees for these benefits.

4 When it comes to the area of professional services,
5 there has been some questions in the ethics of the
6 professions as well as some possible question as to whether
7 say a doctor, could incorporation for the practice of his
8 profession.

9 The present House Bill 197 is a bill that would
10 enable professional individuals under regulation by their
11 own regulating board, as well as supervision by the
12 Secretary of State under the forming of the corporation.
13 But this Bill would enable professional people to practice
14 their profession by the business means of a corporation. It
15 would have no effect whatsoever, upon the personal
16 relationship treated between the doctor and his patient, for
17 example, or the dentist and his patient or the lawyer and
18 his client but would merely enable them to conduct their
19 business in a corporate form rather than as most of them do
20 now, as sole proprietorships or as partnerships.

21 I might mention this: That this type legislation has
22 received very favorable treatment throughout the United
23 States. As of one year ago about 15 states had met this
24 problem and had formed or have enacted enabling legislation
25 of one kind or another to allow the same result. Several of

1 those had done it by means of a professional corporation
2 act. Other states by allowing what they call an association
3 act. As of today, one year later, about 23 or 24 states
4 have now passed this type of enabling legislation and, to my
5 knowledge, similar legislation is before most, if not all,
6 of the other states.

7 This is the basic purpose of the Act. It is, I
8 should say, a non-controversial bill. It has the support of
9 the medical profession. It has the support of the dental
10 profession and other professions and I don't think that
11 there would be any particular objections.

12 If anyone has a question I'll be certainly happy to
13 do my best to answer it.

14 MR. SPEAKER: Representative Loverage?

15 REPRESENTATIVE LOVERAGE: Mr. Speaker, I should
16 like to ask Representative Watkins a question.

17 MR. SPEAKER: Will you respond?

18 REPRESENTATIVE WATKINS: Yes.

19 REPRESENTATIVE LOVERAGE: In connection with
20 suits, liable suits, would these individuals still be
21 individually liable in the case of a suit of liable? I know
22 that in some instances corporations may not be, individuals
23 may not be sued but only the corporation. Now, what would
24 be the status of these people?

25 REPRESENTATIVE WATKINS: I can read Section 10

1 of the Act which states: "This Act does not alter any law
2 applicable to the relationship between a person rendering
3 professional services and a person receiving such services,
4 including liability arising out of such professional
5 services."

6 Therefore, the doctor, for example, who
7 incorporates, would not be given limited liability as most
8 corporations provide. That is the--I might mention this
9 too: The term has been coined "Professional Corporation"
10 for this very reason, to point out that the professional
11 ethics and the same standards that now exist between the
12 professional person and his client or patient will remain
13 even though he incorporates.

14 If there are no other questions, Mr. Speaker--

15 REPRESENTATIVE PETERSON: Mr. Speaker, I should
16 like to ask Representative Watkins a question. Could you
17 just briefly tell us what these tax advantages are with
18 regards to these professional people?

19 REPRESENTATIVE WATKINS: The main tax advantage,
20 Mr. Peterson, is the adoption of what we call profit
21 sharing or pension plans. Under the corporation, of
22 course, it can adopt a plan for the benefit of its
23 employees. A partnership can do the same thing for the
24 benefit of the employees, but in the partnership the partner
25 is not an employee, he is an employer. Whereas, under a

1 corporation, the owner-type person is both an employee as
2 well as an owner of stock. So this is the main benefit,
3 that of the adoption of retirement plans such as pension and
4 profit sharing plans.

5 MR. SPEAKER: Any further questions? The
6 question has been called for. I'll ask the chief clerk to
7 call the role on final passage. Representative Peterson?

8 REPRESENTATIVE PETERSON: Mr. Speaker, if there
9 is no opposition to this Bill I would move the rules be
10 suspended, The clerk be permitted to cast the vote of the
11 entire House in favor of this bill.

12 MR. SPEAKER: You heard the motion. All in
13 favor--

14 UNIDENTIFIED SPEAKER: (Inaudible).

15 MR. SPEAKER: Any final direction? Any other
16 objections? All right. All except Representative Anderson,
17 all in favor of this motion say aye.

18 UNIDENTIFIED SPEAKERS: Aye.

19 MR. SPEAKER: All those no? The ayes have it
20 and if you'll remain in your seats I will ask the chief
21 clerk to make the count.


22 END OF RECORDING.
23
24
25

C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Penny C. Abbott, do hereby certify I am a Certified Shorthand Reporter and Notary Public in and for the State of Utah. That on the 9th day of September, 1987 I transcribed into typewritten form, from tape recording, the record a House of Representatives hearing regarding House Bill 197 as herein contained in pages 1 through 5, both inclusive. And that said transcript is accurate to the best of my knowledge and ability, some parts of the recording being inaudible due to background noise and numerous persons speaking at once.

WITNESS my hand and official seal this 1st day of
September, 1987.


Penny C. Abbott, C.S.R.
& Notary Public

My commission expires:
September 24, 1988

CERTIFICATE OF SERVICE

Served the foregoing Petition for Certiorari this 18
day of February, 1988, by mailing four copies thereof, postage
prepaid, to the following:

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