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LEGAL MALPRACTICE—Membership in a Professional Corporation Does Not Confer upon an Attorney-Shareholder a Limitation on Personal Liability for Attorney's Breach of Duty: *Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corporation*¹

I. INTRODUCTION

Prior to the passage of the New Mexico Professional Corporation Act of 1963,² partnerships provided the most common means for association within the legal community.³ When a client had retained one member of a law partnership, the client effectively retained each of the individual members of the firm with the result that each partner would be held vicariously liable⁴ not only for his own malpractice, but also for the tortious acts of the other members of the firm.⁵ With the passage of the Professional Corporation Act, questions arose with regard to the liability of persons within a professional corporation and how it differed from the liability of those engaged in a partnership. In *Sanders, Bruin, Coll, & Worley P.A. v. McKay Oil Corporation*,⁶ the New Mexico Supreme Court held that attorney-shareholders in a law firm organized as a professional corporation are not shielded from personal liability for the attorney's own negligence when acting within the attorney's professional capacity.⁷ This Note describes the personal liability of shareholders of a professional corporation for both professional and business obligations, examines the rationale of *Sanders*, and explores the implications of that decision.

II. STATEMENT OF THE CASE

Roy McKay (McKay) filed a counterclaim against the law firm of Sanders, Bruin, Coll & Worley, P.A. (the firm) as a corporation, and against each of the five attorney-shareholders of the firm individually, for breach of contract and wrongful termination after the firm withdrew from its representation of McKay six weeks

1. 123 N.M. 457, 943 P.2d 104 (1997).

2. N.M. STAT. ANN. §§ 53-6-1 to -13 (Repl. Pamph. 2001).

3. See Walter W. Steele, Jr., *How Lawyers Protect the Family Jewels...The Invention of Limited Liability Partnerships*, 39 S. TEX. L. REV. 621, 622 (1998).

4. Vicarious liability is the responsibility of one person, without any wrongful conduct of his own, for the tort of another. Its modern justification is a policy which places such responsibility upon the party best able to bear and distribute the risk. Vicarious liability is the responsibility of A for the tort of B committed against C, where A himself has had no part in the tortious conduct. Since A has been free from any negligence or any wrongful intent, it is a form of strict liability. Its foundation, however, is still a tort on the part of B, and its effect is to make A liable to the same extent as B. The most familiar illustration, of course, is the liability of a master for the torts of his servant in the course of his employment.

WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 62 (1941).

5. See *George v. Caton*, 93 N.M. 370, 375, 600 P.2d 822, 827 (Ct. App. 1979) (holding that "[p]laintiff retained the firm of White and Caton. This was equivalent to retaining each member of the firm, although one member of the firm had been consulted"); see also *Bossert Corporation v. City of Norwalk*, 253 A.2d 39 (Conn. 1968) (holding that the retaining of a law firm was equivalent to retaining each of its members even though only one of the members of the firm may have been actually consulted).

6. 123 N.M. 457, 943 P.2d 104 (1997).

7. *Id.* at 462, 943 P.2d at 109. Other questions, such as whether a shareholder in a professional corporation would be personally responsible for their fellow shareholder's professional liabilities and whether they would be liable for the debts or contractual obligations of the corporation, have yet to be examined.

before the firm was to represent him in a multi-million dollar arbitration.⁸ Without Damon Richards, the primary counsel for plaintiff, present, the other four attorney-shareholders held a meeting at which they each agreed to sever the attorney-client relationship with McKay.⁹ In furtherance of this end, the firm sent a letter signed by all five of the attorney-shareholders, including Damon Richards, that notified McKay of his termination.¹⁰ Upon receipt of the termination letter, McKay retained other counsel.¹¹ This attorney successfully defended McKay in the arbitration.¹² The Sanders firm filed an action against McKay to collect unpaid attorneys fees for work it had allegedly done before McKay's termination.¹³ McKay responded by filing a counterclaim that presented his legal malpractice claims, seeking recovery from both the professional corporation and each of the five attorney-shareholders individually.¹⁴

The four attorney-shareholders who had decided to end the firm's representation of McKay jointly filed a motion for summary judgment. The trial court granted the motion on the ground that the termination was a "corporate act for which the lawyers would not have individual liability."¹⁵ McKay appealed the judgment of the trial court, and the New Mexico Court of Appeals certified the case to the New Mexico Supreme Court.¹⁶ The supreme court held that summary judgment should not have been granted and therefore reversed and remanded the case to the trial court for hearing.

III. BACKGROUND

Historically, lawyers associated in either general or limited partnerships.¹⁷ The Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."¹⁸ Each partner is jointly and

8. *Id.* at 458, 493 P.2d at 105. McKay filed this counterclaim after the firm brought an action seeking to collect unpaid attorney's fees that had accrued prior to their withdrawal.

9. *Id.*

10. The letter, dated September 16, 1992, reads:

Dear Roy:

After careful consideration and much prayer, our firm has decided to immediately withdraw as your attorneys on the McKay/Royale case, and to further terminate all business relationships with you. Our overriding concern is the health and well-being of Damon Richards. Additionally, we lack the necessary manpower to properly represent you.

We will immediately begin an orderly withdrawal from your cases. You can be assured of our cooperation and assistance with future counsel.

We are grateful for your friendship and business thru the years.

Letter from Sanders firm to Roy McKay (Sept. 16, 1992) (on file with the NEW MEXICO LAW REVIEW).

The five attorney-shareholders, in their capacity as shareholders, signed the letter. There are facts, however, that suggest Richards did not support the termination but was fearful that he would lose his job had he decided not to sign the letter presented to him by his colleagues.

11. *Sanders*, 123 N.M. at 458, 943 P.2d at 105.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. See N.M. STAT. ANN. § 34-5-14 (Repl. Pamp. 2001). The Supreme Court granted certification in the instant case under section 34-5-14(C)(2), noting that this case presented issues of "substantial public interest." *Sanders*, 123 N.M. at 458, 943 P.2d at 105 (1997).

17. See Steele, *supra* note 3, at 621.

18. UNIFORM PARTNERSHIP ACT § 6(1).

severally liable for the debts of the partnership incurred where "any partner is acting in the ordinary course of the business of the partnership or with the authority of his co-partners."¹⁹

More recently, attorneys choosing to associate have been able to take advantage of state statutes providing for the creation of limited liability partnerships. A limited liability partnership is a "partnership formed by two or more persons...and having one or more general partners and one or more limited partners."²⁰ In a limited liability partnership, a limited partner is "not liable for the obligations of a limited partnership unless he [or she] is a general partner or...participates in the control of the business."²¹ Essentially, professional associates who choose not to have a voice in the active management of the partnership can limit their liability for partnership debts to their initial contribution to the partnership.²²

Traditionally, the licensed professions were not allowed to incorporate. The primary differences between partnerships and corporations are in the management structure and the provisions regarding liability. In contrast to the general partnership, the management of the corporation is centralized in a board of directors.²³ An attractive feature of the corporate form is that a shareholder of a corporation is not personally liable for the "acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct."²⁴ In addition to being deprived of limited liability, professionals also were not entitled to certain tax advantages such as tax-qualified pension plans that were available to corporations and their employees.²⁵

Professionals urged courts and state legislatures to allow for the association of professionals within the structure of a corporation. Courts and state legislatures were reluctant to allow professional corporations because they "may have the effect to lower the standards of responsibility owed by attorneys to their clients."²⁶ Nonetheless, all fifty states now permit all or certain of the learned professions to practice as professional corporations or associations, though almost all have adopted a "savings clause"²⁷ similar to that embodied in N.M. Statute Annotated section 53-6-8, which provides, in part, that "[t]he Professional Corporations Act...does not modify the legal relationships, including confidential relationships, between a person performing professional services and the client or patient who receives such services...."²⁸ The New Mexico legislature, seeking to limit the personal liability of

19. UNIFORM PARTNERSHIP ACT § 13-15.

20. REVISED UNIFORM LIMITED PARTNERSHIP ACT § 101(7).

21. REVISED UNIFORM LIMITED PARTNERSHIP ACT § 303(a).

22. See REVISED UNIFORM LIMITED PARTNERSHIP ACT § 17(1).

23. See REVISED MODEL BUSINESS CORPORATION ACT § 8.01.

24. REVISED MODEL BUSINESS CORPORATION ACT § 6.22.

25. For a comprehensive examination of the relation between the New Mexico Professional Corporation Act and the federal income tax laws prior to the passage of the "check-the-box" regulations, see generally Robert Desiderio et al., *The New Mexico Professional Corporation*, 9 NAT. RESOURCES J. 591, 591-610 (1969); see also *In re Rhode Island Bar Association*, 263 A.2d 692 (R.I. 1970).

26. *S. High Dev., Ltd. v. Weiner, Lippe, & Cromley Co., L.P.A.*, 445 N.E.2d 1106, 1109 (Ohio 1983).

27. See ALFRED CONARD ET AL., *ENTERPRISE ORGANIZATION: UNIVERSITY CASEBOOK SERIES* (3ded. 1982). The five states that do not have a "savings clause" are Alabama, Colorado, Indiana, New York, and Rhode Island.

28. The Professional Corporations Act [53-6-1 to 53-6-13 NMSA 1978] does not modify the legal relationships, including confidential relationships, between a person performing professional

shareholders for purely business obligations, included within this section an additional provision that provides that "the liability of shareholders shall be otherwise limited as provided in the Business Corporation Act and as otherwise provided by law."²⁹ This language strongly suggests that, with the exception set forth in section 53-6-8, the liability protection afforded to shareholders of a professional corporation is the same as that provided for under general business corporation law—limited liability for both the tortious and contractual misconduct of other members.³⁰

IV. RATIONALE OF THE SANDERS COURT

In *Sanders*, the New Mexico Supreme Court interpreted the New Mexico Professional Corporation Act³¹ to provide that professional corporations supply no protection from personal liability for an attorney's own malpractice or obligations individually incurred by breach of duty.³² The firm contended that the attorney-shareholders should not be found personally liable because the termination of McKay was an act of the corporate body rather than that of any individual attorney-shareholder.³³ The court rejected this argument, in part based on an examination into the origins of the professional corporation.³⁴

In response to concerns that incorporation may possibly detract from the professional accountability of attorneys, many jurisdictions passed legislation containing a "savings" provision similar to that found in the Professional Corporation Act in New Mexico.³⁵ This clause provides that incorporation does not modify the legal relationships between a person performing professional services and the client who receives such services³⁶ and ensures that the lawyer who is guilty of negligence will be personally liable to the client.

Courts, however, frequently disagreed as to shareholder or member liabilities for contractual and pure business obligations.³⁷ Some courts held that just as officers and employees of corporations would not be held personally liable for business or contractual decisions, so too attorney-shareholders associated in a professional

services and the client or patient who receives such services; but the liability of shareholders shall be otherwise limited as provided in the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] and as otherwise provided by law.

N.M. STAT. ANN. § 53-6-8 (Repl. Pamp. 2001) (bracketed material in original).

29. N.M. STAT. ANN. § 53-6-8 (Repl. Pamp. 2001).

30. See generally N.M. STAT. ANN. § 53-11-1 to -18-12 (Repl. Pamp. 2001).

31. See *supra* note 28 and accompanying text.

32. See *Sanders*, Bruin, Coll & Worley, P.A. v. McKay Oil Corp., 123 N.M. 457, 461, 943 P.2d 104, 108 (1997).

33. See *id.*

34. See *id.*

35. See *id.*

36. See N.M. STAT. ANN. § 53-6-8 (Repl. Pamp. 2001).

37. See *Sanders*, 123 N.M. at 461, 943 P.2d at 108; *We're Associates. Co. v. Cohen, Stracher & Bloom, P.C.*, 478 N.Y.S.2d 670 (N.Y. App. Div. 1984) (holding that the personal liability of an individual shareholder of a professional corporation is limited to liability arising out of misconduct while rendering professional services on behalf of the corporation); *but see S. High Dev., Ltd. v. Weiner, Lippe & Cromley Co., L.P.A.*, 445 N.E.2d 1106, 1108 (Ohio 1983) (*per curiam*) (providing that attorney-shareholders of a professional corporation are personally liable for rents due under a lease because individual shareholders of a legal professional association are personally liable for the debts of that association).

corporation were not to be liable for business conduct that was not classified as professional.³⁸ Other courts saw no need to extend such protection to professional corporations.³⁹

The *Sanders* court found it unnecessary to rule on this question because it concluded that the withdrawal from representation was not a mere business decision. Rather, the court noted that withdrawal from representation is governed by Rule 16-116(B) of the New Mexico Rules of Professional Conduct⁴⁰ and determined that the decision to terminate the attorney-client relationship was "well within the scope of legal representation."⁴¹ Accordingly, the court concluded that the individual attorney-shareholders who participated in the decision to terminate McKay would not be permitted to use their position within the professional corporation as a shield from individual liability for their own improper behavior or malpractice.⁴² The court therefore held that the attorney-shareholders had acted in their professional capacity as attorneys when deciding to terminate McKay and, in so doing, each would be personally responsible to McKay if their conduct in terminating him constituted a breach of duty.⁴³ The court determined that the question as to whether each attorney's actions rose to the level of malpractice remained.⁴⁴ Consequently, the court reversed the order granting summary judgment and remanded the case for a determination on this issue.⁴⁵

V. ANALYSIS

The *Sanders* case highlights the ubiquitous tension in New Mexico between the courts and the state legislature, particularly with regard to a subject that has traditionally been governed by the New Mexico Supreme Court—the responsibilities of attorneys. In this case, the court appears to accept the legislative intrusion into their realm, affording professionals associated within professional corporations the limited liability granted to them by the state legislature for both professional misdeeds in which they do not participate and for business decisions, while preserving an attorney-shareholder's liability for his own malpractice.

38. See *We're Associates Co. v. Cohen, Stracher & Bloom, P.C.*, 478 N.Y.S.2d 670 (N.Y. App. Div. 1984).

39. See *S. High Dev.*, 445 N.E.2d at 1108.

40. Rule 16-116(B) NMRA 1997 provides in pertinent part that a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if: (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (6) other good cause for withdrawal exists.

This provision is qualified by 16-116(D), which provides in part:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

41. *Sanders*, 123 N.M. at 459, 943 P.2d at 106.

42. *Id.* at 460, 943 P.2d at 107.

43. See *id.* at 463, 943 P.2d at 110.

44. See *id.* at 462, 943 P.2d at 109.

45. See *id.* at 463, 943 P.2d at 110.

A. An Attorney-Shareholder's Liability within a New Mexico Professional Corporation for One's Own Malpractice and that of the Other Attorney-Shareholders.

The New Mexico Professional Corporation Act provides that "[t]he Professional Corporation Act...does not modify the legal relationships, including confidential relationships, between a person performing professional services and the client or patient who receives such services; but the liability of shareholders shall be otherwise limited as provided in the Business Corporation Act...and as otherwise provided by law."⁴⁶ The statute, as well as the *Sanders* court holding, requires that a professional in a professional corporation continue to be liable for the professional's own misdeeds, as he would have been had he been a partner or limited partner. In addition, the corporation is vicariously liable for the professional liabilities of an attorney arising within the scope of the attorney's work in the professional corporation.⁴⁷ Therefore, the *Sanders* court concluded that "professional corporate status was not intended to confer, nor does it confer, upon an attorney-shareholder a limitation on liability for the attorney's own improper behavior or malpractice."⁴⁸ Although an attorney-shareholder will continue to be liable for his own tortious conduct, the court strongly suggests that he would not be vicariously liable for the misdeeds of other shareholders in which he does not participate.

In *Sanders*, the court, presumably recognizing that unlimited liability is not necessary to assure quality services by a professional within a professional corporation, noted in dictum⁴⁹ that a "professional corporation will provide limited protection for the misdeeds of fellow attorney-shareholders."⁵⁰ Moreover, the court explicitly rejected the application of traditional partnership law precepts to a professional corporation.⁵¹ Such a determination with regard to a limitation on liability is not only well supported by a number of jurisdictions⁵² and the American Bar Association so long as such restrictions on liability are made apparent to the

46. N.M. STAT. ANN. § 53-6-8 (Repl. Pamph. 2001).

47. *We're Associates Co. v. Cohen, Stracher & Bloom, P.C.*, 478 N.Y.S.2d 670, 674 (N.Y. 1984).

48. *Sanders*, 123 N.M. at 460, 943 P.2d at 107.

49. A statement, remark, or observation. The word is generally used as an abbreviated form of obiter dictum, "a remark by the way," that is, an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion. Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication. Dicta are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself.

BLACK'S LAW DICTIONARY 454 (6th ed. 1990).

50. *Sanders*, 123 N.M. at 463, 943 P.2d at 110.

51. *See id.* at 460, 943 P.2d at 107.

52. *See* ALA. CODE § 10-4-390 (1985); ALASKA STAT. § 10.45.140 (Michie 1962); HAW. REV. STAT. § 416-153 (1976); IOWA CODE ANN. § 496C.9 (West 1985); KY. REV. STAT. ANN. § 274.055 (Baldwin 1981); LA. REV. STAT. ANN. § 12:807 (West 1969); ME. REV. STAT. ANN. Tit. 13, § 708 (West 1964); MINN. REV. STAT. § 319A.10 (West 1986); NEV. REV. STAT. § 89.060 (1979); N.M. STAT. ANN. § 53-6-8 (1978); N.D. CENT. CODE § 10-31-09 (1985); R.I. GEN. LAWS § 7-5.1-1 (1985); S.C. CODE ANN. § 33-51-70 (Law. Co-op. 1976); S.D. CODIFIED LAWS § 47-13A-7 (Michie 1983); TEX. STAT. ANN. art. 1528c(16) (Vernon 1980).

client,⁵³ but also finds support in the two jurisdictions with Professional Corporation Acts most similar to New Mexico's.

The Rhode Island Professional Corporation Act provides that "[e]xcept as otherwise provided in this chapter, all provisions of the general corporation law, including the Rhode Island Business Corporation Act...applicable to domestic business corporations are applicable to corporations organized under this chapter."⁵⁴ Even though the Rhode Island Act does not contain a clause that provides that "[t]he Professional Corporation Act...does not modify the legal relationships, including confidential relationships, between a person performing professional services and the client or patient who receives such services,"⁵⁵ as is found in the New Mexico Act, the Rhode Island Supreme Court has interpreted its Act to provide a grant of non-liability to those attorney-shareholders who do not participate in the wrongful act.⁵⁶ Additional support for maintaining attorney-shareholders' liability for their own misdeeds while limiting their liability for the misdeeds of fellow attorney-shareholders may be found in a close reading of the Iowa Professional Corporation Act.⁵⁷

The New Mexico Supreme Court was correct, and well supported, in its determination that professional corporate status will not shield an attorney-shareholder from his own malpractice though such status does offer limited protection from the malpractice of his fellow attorney-shareholders in which he does not participate. However, the court's statement that an attorney-shareholder will be shielded from liability for the malpractice of a fellow attorney-shareholder in a professional corporation was not essential to the determination of the case and thus lacks the weight given to a formal holding.⁵⁸

53. Attorneys may practice in corporate form provided that the following safeguards are followed: (1) The lawyer rendering the legal services to the client must be personally responsible to the client; (2) Restrictions on liability as to other lawyers in the organization must be made apparent to the client; (3) None of the stockholders may be non-lawyers, or if stock falls into the hands of laymen, provision must be made for transfer back to lawyers; (4) There must be no profit-sharing plans including employees who are non-lawyers; and (5) No layman may be permitted to participate in the management of the firm.

ABA Comm. on Prof'l Ethics, Formal Op. 303 (1961).

54. R.I. GEN. LAWS § 7-5.1-1 (1985).

55. N.M. STAT. ANN. § 53-6-8 (Repl. Pamp. 2001).

56. *See In re Rhode Island Bar Association*, 263 A.2d 692 (R.I. 1970).

57. This chapter does not modify any law applicable to the relationship between an individual practicing a profession and a person receiving professional services, including, but not limited to, any liability arising out of such practice and any law respecting privileged communications. This chapter does not modify or affect the ethical standards or standards of conduct of any profession, including, but not limited to, any standards prohibiting or limiting the practice of the profession by a corporation or prohibiting or limiting the practice of two or more professions in combination. All such standards shall apply to the shareholders, directors, officers, employees, and agents through whom a professional corporation practices any profession in this state, to the same extent that the standards apply to an individual practitioner. Unless otherwise provided in the articles of incorporation, the liability of the shareholders of a professional corporation, as shareholders, shall be limited in the same manner and to the same extent as in the case of a corporation organized under the Iowa Business Corporation Act.

IOWA CODE ANN. § 496C.9 (West 1985).

58. *See supra* note 49 and accompanying text.

B. Classifying a Breach as Within or Outside the Scope of Professional Services

The *Sanders* court appears to have adopted a means by which to classify a breach as being within, or outside of, the scope of professional services comparable to a test adopted by the Wisconsin Supreme Court. To find that a breach may properly be classified as professional in nature, the Wisconsin court requires that the breach “both...relate to professional services and that the breach was a negligent or wrongful act committed in the rendition of those professional services.”⁵⁹ The *Sanders* court found that the firm’s breach related to professional services since it was governed by Rule 11-616(B) of the Rules of Professional Conduct and because the breach occurred while rendering professional services.⁶⁰ In addition, public policy supports the imposition of a duty because McKay had reason to believe that his case would be handled in a professional manner and would not be abandoned six weeks before a multi-million dollar arbitration.⁶¹ This rule “preserves the personal responsibility of a professional for services within his expertise and which the client has every right to expect will be performed in a professional manner.”⁶² Finally, this “test” will enhance judicial efficiency and will lead to greater consistency and uniformity as the New Mexico courts now have some indication of what factors to consider when presented with a case that requires a determination of whether a breach is professional or nonprofessional in nature.

C. An Attorney-Shareholder’s Liability within a New Mexico Professional Corporation for Obligations of a Purely Business Nature

The *Sanders* court noted in dictum that “professional corporate status was not intended to confer, nor does it confer, upon an attorney-shareholder a limitation on liability for the attorney’s own improper behavior or malpractice, even in the context of corporate activities and decisions.”⁶³ Although at first glance this appears to be an erosion of the legislative grant of limited liability to shareholders who practice in professional corporations, upon closer examination it becomes apparent that it is not.

The New Mexico Professional Corporation Act provides that the liability of the shareholders of a professional corporation is limited in the same manner and to the same extent as in the case of a corporation organized under the New Mexico Business Corporation Act.⁶⁴ Section 53-11-25 of the New Mexico Business Corporation Act provides that “[a] holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to the shares other than the obligation to pay to the corporation the full consideration for which the shares were issued or to be issued.”⁶⁵ This means that a shareholder’s

59. *Herkert v. Stauber*, 317 N.W.2d 834, 845 (Wis. 1982).

60. See *supra* note 40 and accompanying text.

61. In New Mexico, in addition to the question of foreseeability, the court must determine whether public policy supports the imposition of a duty by considering “legal precedent, statutes, and other principles comprising the law.” *Calkins v. Cox Estates*, 110 N.M. 59, 62, 792 P.2d 36, 39 (1990).

62. *Heckert*, 317 N.W.2d at 845.

63. *Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp.*, 123 N.M. 457, 460, 943 P.2d 104, 107 (1997).

64. See N.M. STAT. ANN. § 53-6-8 (Repl. Pamp. 2001).

65. N.M. STAT. ANN. § 53-11-25(A) (Repl. Pamp. 2001).

liability is limited "to the amount he has contributed to the corporation."⁶⁶ Two cases, *We're Associates Company v. Cohen, Stracher & Bloom, P.C.*⁶⁷ and *Morrow v. Cooper*,⁶⁸ examine why, aside from a clear legislative directive, the court should extend the same limitation on liability to shareholders of a professional corporation as is enjoyed by shareholders of a business corporation and should define the boundaries of this legislative grant of limited liability.

In *We're Associates*, the New York court explained why a shareholder of a professional corporation is entitled to the same limitation on liability as a shareholder in a business corporation. The court here was presented with the issue of whether shareholders of a professional corporation are personally liable for rents due under a lease executed solely in the name of the corporation.⁶⁹ The court reasoned that since a major characteristic of a general corporation is its provisions for limited liability and since "professional corporations organized under those statutes would have to exhibit the major characteristics of a general corporation," the legislature must have intended that a shareholder's liability for contractual obligations for corporate activities and decisions within a professional corporation be limited to the assets of the corporation.⁷⁰ Therefore, the court, finding "no basis for concluding that attorneys who practice in a professional corporation have some exceptional legal obligation over and above that of other professionals simply by virtue of their particular profession," held that shareholders of a professional corporation should "enjoy the same benefits of limited liability afforded to shareholders of any other form of corporation."⁷¹ This grant of limited liability, however, may be subject to the same exceptions that affect shareholders in business corporations.

In *Morrow v. Cooper*,⁷² the New Mexico Court of Appeals considered when a shareholder of a professional corporation might be personally liable for a corporate act. In *Morrow*, the court examined an individual judgment entered against a shareholder of a professional corporation in favor of the other shareholders predicated "solely upon a failure of the corporation to properly value the stock of the corporation."⁷³ The court cited with approval *Scott v. AZL Resources, Inc.*,⁷⁴ a case in which the New Mexico Supreme Court noted that "[o]nly under special circumstances will the courts disregard the corporate entity to pierce the corporate veil holding individual shareholders...liable. This is done where the corporation was set up for fraudulent purposes or where to recognize the corporation would result in injustice."⁷⁵ Speaking of the liability of a shareholder in a professional corporation for the general business debts of the corporation, the court declared that "[t]o hold an individual liable for corporate debts, the complaining party must establish that

66. *Morrow v. Cooper*, 113 N.M. 246, 249, 824 P.2d 1048, 1051 (Ct. App. 1991).

67. 478 N.Y.S.2d 670 (N.Y. App. Div. 1984).

68. 113 N.M. 246, 824 P.2d 1048 (Ct. App. 1991).

69. See *We're Associates*, 478 N.Y.S.2d at 671.

70. *Id.* at 672-73.

71. *Id.* at 675.

72. 113 N.M. 246, 824 P.2d 1048 (Ct. App. 1991).

73. *Id.* at 249, 824 P.2d at 1051.

74. 107 N.M. 118, 753 P.2d 897 (1988).

75. *Id.* at 121, 753 P.2d at 900.

the corporation should not be recognized as a matter of law."⁷⁶ The *Morrow* Court, finding that the professional corporation in question had not been established for a fraudulent purpose, reversed on the issue of Cooper's individual liability.⁷⁷

Morrow demonstrates that a shareholder usually is only personally responsible for the general debts of a corporation when the corporate veil can be pierced. *Morrow* acknowledged a second situation, however, in which the shareholder could be held liable: "The Professional Corporation Act does not preclude a corporate officer or employee from being sued individually for his wrongful acts."⁷⁸ It is clear, then, that a shareholder, whether practicing within a professional corporation or simply a shareholder or employee of a general corporation, is not entirely insulated from personal liability for general corporate debts. Rather, as demonstrated by *Morrow*, a shareholder in a professional corporation may be exposed to personal liability upon a showing that the professional corporation had been established for a fraudulent purpose and may also expose himself to personal liability for his own wrongful acts. Thus, the *Sanders* court correctly asserted that attorney-shareholders will be liable for their own misdeeds within the context of corporate activities and decisions, provided that by use of the phrase "improper behavior" the court meant that the attorney-shareholder must have created the corporation for an improper purpose or personally committed wrongful acts.

There is question, however, as to whether the court will analyze the actions of the attorney-shareholders merely as shareholders, or whether the attorney-shareholders' participation in the management of the corporation will lead the court to analyze their liability, alternatively, in the role of officers, when presented with a situation where the improper conduct is classified as outside of the scope of professional services.⁷⁹

Just as shareholders of a professional corporation are subject to the same exceptions to liability as shareholders of a business corporation, so too are directors of a professional association to be similarly subject to the same exceptions to liability as directors of a business corporation. Thus, in *Stinson v. Berry*, the New Mexico Court of Appeals recognized that directors of a corporation are liable to third persons when they engage in misconduct.⁸⁰ In that case, the estate brought an action against defendant Yucca Feeds, Inc., a corporation, and John Berry, the president and manager of the corporation, after the decedent was fatally injured while engaged in the performance of services for the corporation. The court noted that "[d]irectors are liable to third persons injured by their own tortious conduct regardless of whether they acted on behalf of the corporation and regardless of whether the corporation is also liable."⁸¹ Thus, "if corporate directors engage in tortious conduct, even though acting within the scope of their corporate duties, they

76. *Morrow*, 113 N.M. 246, 249, 824 P.2d at 1051.

77. *Id.*

78. *Id.*

79. "The law imposes the business management of a corporation on its directors." 18B AM. JUR. 2d Corporations § 1703 (1985).

80. 123 N.M. 482, 943 P.2d 129 (Ct. App. 1997).

81. *Id.* at 487, 943 P.2d at 134.

can be personally liable for the injuries suffered as a result of that conduct.”⁸² The court determined that since “[d]irector status...neither immunizes a person from individual liability nor subjects him or her to vicarious liability,” the trial court erred in granting summary judgment in favor of John Berry on the ground that he was acting within the scope of his corporate duties.⁸³

The *Stinson* court additionally set out basic propositions of corporation law that apply to the *Sanders* case. First, the court noted that since “a corporation is a legal entity, separate from its shareholders, directors, and officers,” the “shareholders, directors, and officers are not personally liable for the acts and obligations of the corporation.”⁸⁴ Moreover, the court stated that “directors cannot be held vicariously liable for the corporation’s torts merely by virtue of the office they hold.”⁸⁵ The court, however, reiterated that “if an officer or director directs or actively participates in the commission of the tortious act of the corporation, he will be liable, along with the corporation.”⁸⁶ Therefore, “if the officer or director directed, controlled, approved or ratified the activity that created liability in tort to a third person, he or she can be held personally liable.”⁸⁷

It is possible to view the decision of the four shareholders to terminate McKay as an act of the directors of the corporation.⁸⁸ Even if the court analyzed the liability of the four shareholders in *Sanders* in the role of directors of the professional corporation, the outcome would still be the same—an attorney-shareholder, where acting as a corporate director, will not be personally liable for a general corporate debt, absent some showing of “improper behavior” that the director engaged in, approved of, or assented to. Thus, the *Sanders* court’s statement that attorney-shareholders would be personally liable for their own improper behavior in the context of corporate activities and decisions is in accord with prior New Mexico cases and both the Professional Corporation and Business Corporation Acts.

Finally, the *Sanders* court’s declaration that an attorney-shareholder will be liable for their “own improper behavior” (emphasis added) for corporate activities and decisions strongly suggests that an attorney-shareholder in a professional corporation will *not* be vicariously liable for the corporate misdeeds of the other attorney-shareholders in which they do not participate.⁸⁹ As opposed to a professional partnership where “each partner is jointly and severally liable for all of the obligations of the partnership—both contractual and those arising from the acts or omissions of a member of a partnership,”⁹⁰ a professional corporation will limit the personal liability of an attorney-shareholder for corporate debts “to the amount he has contributed to the corporation” and will insulate the personal assets of the individual attorney-shareholder so long as they do not assent to, or participate in, the

82. *Id.*

83. *Id.* at 486, 943 P.2d at 133.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. See *supra* note 79 and accompanying text.

89. *Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp.*, 123 N.M. 457, 460, 943 P.2d 104, 107 (1997).

90. *We're Associates Co. v. Cohen, Stracher & Bloom, P.C.*, 478 N.Y.S.2d 670, 674 (N.Y. App. Div. 1984).

“improper behavior” that has exposed the other attorney-shareholder to personal liability.⁹¹

Thus, it was the attorney-shareholders' unanimous decision to terminate McKay's representation that exposed them to liability. Possibly, if any one of the four attorney-shareholders dissented from the decision, that shareholder may not have been liable. Section 53-11-35(C) of the New Mexico Business Corporation Act sets forth the applicable procedure for dissenting to an act of the board of directors:

A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless the director shall file written dissent in the minutes of the meeting or unless the director shall file written dissent to such action with the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.⁹²

As noted by the *Morrow* court in the context of corporate activities, “although the Professional Corporation Act does not preclude a corporate officer or employee from being sued individually for his wrongful acts, and he can also make the corporation liable for his wrongful acts, the other professional shareholders, who are also the other professional employees, cannot be held liable.”⁹³ Therefore, just as professional corporate status may shield attorney-shareholders from vicarious liability for the professional misconduct of a fellow attorney-shareholder, such status may similarly insulate them from the corporate misdeeds of their fellow attorney-shareholders or directors so long as they do not commit improper acts.

VI. IMPLICATIONS

After the *Sanders* case, an attorney-shareholder in a professional corporation will continue to be liable for his own malpractice. *Sanders* also suggests that the professional corporation statute provides a shield for an attorney-shareholder from vicarious liability for a fellow attorney-shareholders' malpractice, though the issue has yet to be necessarily determined. Thus, it appears as though an attorney-shareholder does not have to worry about his colleague's competence as he did when he entered a partnership. For the time being, it would be prudent, if one seeks to limit one's liability with regard to one's fellow attorney-shareholders' malpractice, to make such restrictions on liability apparent to the professional corporation's client.⁹⁴

91. *Morrow v. Cooper*, 113 N.M. 246, 249, 824 P.2d 1048, 1051 (Ct. App. 1991). See *In re Rhode Island Bar Association*, 263 A.2d 692, 697 (R.I. 1970) (noting that “[t]he only substantial change made by the act from practice of law in partnership form is that...the lawyer-shareholders who do not participate in the rendering of the services out of which an actionable wrong arises will be free from personal liability and will not be responsible for the debts of the corporation”).

92. N.M. STAT. ANN. § 53-11-35(C) (Repl. Pamp. 2001).

93. *Morrow*, 113 N.M. at 249, 824 P.2d at 1051.

94. See *supra* note 53 and accompanying text. Canon 33 of the American Bar Association's Canons of Professional Ethics provides that in the “selection and use of a firm name, no false, misleading, assumed or trade name should be used.” MODEL CODE OF PROF'L RESPONSIBILITY Canon 33 (1928). Formal Opinion 303 notes that the “name under which a group of lawyers practices would be misleading if it failed to reveal any restrictions on

In addition, *Sanders* provides that an attorney-shareholder will enjoy the same limitation on liability in the context of corporate activities and decisions as would a shareholder of a general corporation. This, however, is not a blanket shield from all liability for activities within the corporate context.⁹⁵ Attorney-shareholders will continue to be personally liable for their *own* improper behavior within the corporate realm, while being shielded from personal liability for misdeeds within the business context in which they do not partake.⁹⁶

VII. CONCLUSION

In *Sanders*, the New Mexico Supreme Court held that attorney-shareholders in a law firm organized as a professional corporation would not be shielded from individual liability for the attorneys' own negligence when acting within their professional capacity. In so doing, the court has attempted to ensure that attorneys, and other professionals, would not be able to escape responsibility for their misdeeds simply by choosing a more favorable means of association. The court suggested that it would limit an attorney-shareholder's liability to his own "malpractice" for professional misdeeds and his "own improper behavior" within "the context of corporate activities and decisions."⁹⁷ Finally, the case pronounces a logical and workable standard for determining whether a decision is professional in nature. Although *Sanders* leaves certain central questions as to the liability of shareholders of professional corporations unanswered, it sends a clear message that this means of association was not intended to confer, nor does it confer, a limitation on liability for an attorney's own malpractice.

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the responsibility of the individual lawyers for the legal services rendered." ABA Comm. on Prof'l Ethics, Formal Op. 303 (1961). However, Formal Opinion 303 fails to address the precise manner by which an attorney can make such restrictions apparent to his client.

95. Recall that the trial court granted summary judgment to the individual attorney-shareholders after classifying the breach as a corporate activity for which the attorney-shareholders would not be held personally liable without further discussion of whether the breach constituted improper conduct.

96. See *Sanders*, Bruin, Coll & Worley, P.A. v. McKay Oil Corp., 123 N.M. 457, 460, 943 P.2d 104, 107 (1997).

97. *Id.*