HENDERSON v. HSI FINANCIAL SERVICES: GEORGIA JOINS THE GROWING TREND OF LIMITING VICARIOUS LIABILITY FOR LAWYERS

I. INTRODUCTION/BACKGROUND

The cost of legal malpractice is a tremendous problem facing the legal profession today. The cost to insurers of legal malpractice claims has been estimated at upwards of $4 billion, far exceeding all other forms of professional malpractice.\(^1\) However, these claims are not usually borne only by the lawyer whose misdeed creates the cause of action, but also by that lawyer’s partners. This vicarious liability has traditionally been the product of traditional partnership law.\(^2\) Under a theory of respondeat superior, one partner is held to be the agent of the partnership; and his actions, if within the scope of the partnership’s business, bind the entire partnership.\(^3\) In the context of legal malpractice, vicarious liability can have startling consequences for the lawyers of a partnership. For instance, the partners may find themselves individually liable for the malpractice of a fellow partner, and that liability is potentially staggering.\(^4\)

This situation may be changing. Beginning in the 1960s lawyers who previously had only been able to organize within traditional partnership entities began to seek the authority to organize themselves into different business entities, primarily professional corporations.\(^5\) While many of these changes were originally sought primarily for tax purposes,\(^6\) there was a potential added benefit—the possibility that these entities might provide a limitation on the potentially unlimited personal liability of the traditional partnership. Until recently, however, courts, legislators, and the legal profession have traditionally been reluctant to limit the

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3. Id.
5. See, e.g., In re Florida Bar, 133 So. 2d 554 ( Fla. 1961).
6. See id. at 555.
vicarious liability of lawyers associated in professional corporations.\textsuperscript{7}

The Georgia Supreme Court recently held otherwise in \textit{Henderson v. HSI Financial Services}.\textsuperscript{8} In \textit{Henderson}, the court held that lawyers in professional corporations are not jointly and severally liable for the professional misdeeds of their fellow shareholders.\textsuperscript{9} This decision directly overruled the controlling Georgia case law on this question. This Article will examine these decisions and, in light of the decision by the Georgia Supreme Court, will examine current judicial attitudes towards vicarious liability for associations of lawyers.

II. \textit{Henderson v. HSI Financial Services}

A. The Facts

In 1985, attorney Page entered into a contract with HSI Financial Services (HSI) by which Page would collect HSI's delinquent accounts.\textsuperscript{10} He was to remit the collected accounts to HSI every month, less 30 percent for attorney's fees.\textsuperscript{11} In 1988, Page entered into the law firm of Page, Sevy and Henderson (PSH), a professional corporation.\textsuperscript{12}

In 1990, PSH became increasingly delinquent in its remittances to HSI.\textsuperscript{13} From January to March, PSH failed to pay almost $400,000 to HSI.\textsuperscript{14} HSI and PSH settled this delinquency. However two months later, PSH became delinquent again.\textsuperscript{15} In January 1991, when PSH owed HSI almost $675,000, HSI sued.\textsuperscript{16} Page, the member of PSH personally responsible for the malpractice, admitted his responsibility to the State Disciplinary Board and surrendered his license to practice law.\textsuperscript{17} In granting HSI's motion for summary judgment, the trial court placed PSH

\begin{footnotesize}
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\item See, e.g., First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674 (Ga. 1983) (holding shareholder lawyers in a professional corporation liable for the misdeeds of a fellow shareholder attorney).
\item 471 S.E.2d 885 (Ga. 1996).
\item Id. at 887.
\item Page v. HSI Financial Services, 461 S.E.2d 239, 241 (Ga. 1995).
\item Id. at 241.
\item Id.
\item Id.
\item Id.
\item Id.
\item Page, 461 S.E.2d at 241.
\item Id. at 242.
\item Id.
\end{enumerate}
\end{footnotesize}
into receivership and awarded all monies owed, plus various penalties.\textsuperscript{18} The trial court also held Sevy and Henderson vicariously liable for the damages.\textsuperscript{19}

B. The Decision of the Georgia Court of Appeals

In holding Sevy and Henderson personally liable for Page’s misdeeds, the trial court had relied on the Georgia Supreme Court’s decision in \textit{First Bank and Trust Co. v. Zagoria}.\textsuperscript{20} In that decision, the Georgia Supreme Court had dealt squarely with the issue of whether being a shareholder in a professional corporation, rather than a partner in a traditional law partnership, could shield attorneys from vicarious liability in a legal malpractice action.\textsuperscript{21} In \textit{Zagoria}, the Georgia Supreme Court, citing public interest and the integrity of the legal profession, had pointedly refused to abrogate the traditional theory of vicarious liability:

We hold that when a lawyer holds himself out as a member of a law firm the lawyer will be liable not only for his own professional misdeeds but also for those of the other members of his firm. We make no distinction between partnerships and professional corporations in this respect. We cannot allow a corporate veil to hang from the cornices of professional corporations which engage in the law practice.\textsuperscript{22}

On appeal, in \textit{Page}, the Georgia Court of Appeals upheld the trial court’s application of the holding in \textit{Zagoria}.\textsuperscript{23} In so doing, the court noted that Sevy and Henderson’s liability did not spring from any act or failure to act. Rather, it was wholly a product of their professional association with Page.\textsuperscript{24} The court also specifically noted that Sevy and Henderson’s challenge to the constitutionality of \textit{Zagoria} was beyond its jurisdiction.\textsuperscript{25}

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\item \textsuperscript{18} \textit{Id.} at 245.
\item \textsuperscript{19} \textit{Id.} at 242, 245.
\item \textsuperscript{20} 302 S.E.2d 674 (Ga. 1983).
\item \textsuperscript{21} \textit{Id.} at 675.
\item \textsuperscript{22} \textit{Id.} at 676.
\item \textsuperscript{23} \textit{Page}, 461 S.E.2d at 244-45.
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\end{itemize}
C. The Georgia Supreme Court Decision

The Georgia Supreme Court reversed its holding in Zagoria and held that the Georgia professional corporation statute insulated Sevy and Henderson from Page’s misconduct.26 In Zagoria, the Georgia Supreme Court had held that with regard to lawyers, by virtue of its inherent power to regulate the legal profession, it could abrogate the section of the Georgia professional corporation statute which shielded shareholders from vicarious liability.27

In Henderson v. HSI Financial Services,28 the Georgia Supreme Court narrowed its power in a significant manner: while the court could determine whether lawyers could practice in professional corporations, it was up to the legislature to determine “whether a particular structural form provides its members with exemptions from personal liability.”29 Furthermore, the court stated that the combination of the lawyer’s individual liability for his own misdeeds and the corporation’s liability was sufficient to protect the public.30 This is in stark contrast to the dire warnings of a threat to public policy and lawyer integrity outlined in Zagoria.31 At least in Georgia, lawyers can now escape the possibly draconian personal liability for misdeeds by professional associates by merely changing the corporate structure of their practice.

III. DISCUSSION

A. Partnerships

Vicarious liability for legal malpractice, a principle derived from general partnership law, is a very old tradition in America, dating well back into the nineteenth century.32 As long as the lawyer’s wrongful acts

27. Zagoria, 302 S.E.2d at 675.
29. Id. at 886.
30. Id.
31. Compare Henderson, 471 S.E.2d at 886-887 with Zagoria, 302 S.E.2d at 675-676.
32. See, e.g., Cook & Lamkin v. Bloodgood, 7 Ala. 683 (1845); Lupton v. Taylor, 78 N.E. 689 (Ind. 1906); Priddy v. MacKenzie, 103 S.W. 968 (Mo. 1907); Warner v. Griswold, 8 Wend. 665 (N.Y. 1832).
occur within the line and scope of the firm's practice, that lawyer will be deemed an agent of the partnership, and liability for those acts will be imputed to the other partners.\textsuperscript{33} It is irrelevant that the other partners did nothing wrong.\textsuperscript{34} Vicariously liability may even be imposed for the misdeeds of non-lawyer partnership employees, if those employees attempt to provide legal services, and the client reasonably believes the employee has the authority to do so.\textsuperscript{35} Additionally, the other lawyers in the firm may face disciplinary problems for failing to adequately monitor or investigate the actions of the wrongful partner.\textsuperscript{36}

There are some limits on the imposition of vicarious liability. If the lawyer's wrongful conduct occurs outside the firm's ordinary course of business, there will generally be no vicarious liability for the other partners.\textsuperscript{37} Some states have also severely limited the vicarious imposition of punitive damages.\textsuperscript{38}

\textit{B. Professional Corporations}

States have taken widely different approaches to vicarious liability for lawyers associated in professional corporations.\textsuperscript{39} These differing

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33. See Mallen & Smith, supra note 2, at 335.
35. See, e.g., Busch v. Flargas, 837 P.2d 438 (Nev. 1992) (Lawyer held vicariously liable for the malpractice of a law clerk when the law clerk attempted to provide legal services).
36. See generally Jerome Fishkin, 5 No. 1 Legal Malpractice Rep. 10 (1996).
37. See Kuntz v. Carrane, No. 91-C-6145, 1993 WL 85732, at *3 (N.D. Ill. Mar. 22, 1993). See also Sheinkopf v. Stone, 927 F.2d 1259 (5th Cir. 1991) (Uninvolved partners could not be held vicariously liable for investment advice given by partner; investment advice held not to be within the ordinary course of partnership business). But see In re Georgou, 145 B.R. 36 (Bankr. N.D. Ill. 1992) (Under Illinois law vicarious liability imputed even when legal malpractice occurs outside the ordinary course of business).
38. See, e.g., In re WPMK Corp., 59 B.R. 991 (D. Haw. 1986) (Holding that punitive damages could not be vicariously imposed on partnership absent a showing that the partnership ratified, authorized, controlled or participated in alleged tortious activity); Husted v. McClound, 450 N.E.2d 491 (Ind. 1983) (Imposition of punitive damages on partnership improper unless it was the purpose or effect of the tortious act to benefit the partnership).
39. See generally Mallen & Smith, supra note 2.
approaches reflect the division of judicial and legislative opinion as to whether limited vicarious liability is appropriate or prudent for the legal profession.

Some states have imposed partnership liability even where the law firm is organized as a professional corporation rather than the traditional legal partnership. In these states the corporate form provides no limited vicarious liability for the shareholders. In these states, as in Georgia before the Henderson decision, courts have been reluctant to allow lawyers to put up a corporate veil between themselves and imputed liability.

However some states, like Georgia after Henderson, have abrogated the unlimited vicarious liability when lawyers choose to incorporate as a professional corporation. In these states the partner will not suffer liability unless it can be proved that he participated or contributed to the misdeed. In these states, the wronged client will be forced to sue the professional corporation as an entity. Non-shareholder employees, for example, associates, will not be held vicariously liable for the misdeeds of shareholders. Other states have allowed a limitation of vicarious liability only if the firm maintains liability insurance at statutorily-prescribed minimums.

IV. CONCLUSIONS

Limited liability for lawyers associated in professional corporations, established in Georgia in the Henderson decision, appears to be a growing trend. For example, California has recently allowed professionally incorporated lawyers to limit their vicarious liability provided that they

42. See supra notes 26-30 and accompanying text.
43. See, e.g., Sucese v. Kirsh, 606 N.Y.S.2d 60 (N.Y. App. Div. 1993) (holding that attorney could not be vicariously liable for acts unless he committed those acts or the acts were committed by attorney under his control).
47. See supra notes 26-30 and accompanying text.
maintain adequate insurance.  

The increasing allowance of limited liability for associated lawyers is probably due to the increasing frequency of legal malpractice claims. 49 As the amount and number of claims grow lawyers in partnerships will continue to face possibly staggering vicarious liability. As a result of this, it is increasingly likely that lawyers will abandon the traditional legal partnership for professional corporations or other entities which provide a shield from vicarious liability.

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49. See supra note 1 and accompanying text.