

*Insert at pages 61-68 in place of
Liberty Mutual Ins. Co. v. Gardere & Wynne, L.L.P. and following notes*

PROBLEM 1.4

Alma is a partner in a law firm organized as an LLP in Texas. Bob, another partner in the law firm, works in Alma's area of expertise, and his office is next to Alma's. Bob negligently files an action in a matter after the statute of limitations had passed. Assume that Bob and the law firm are liable to the client for Bob's negligence. Assuming that Alma was not negligent, is she personally liable for Bob's negligence? How would any of the following facts affect your answer?

- a. Alma and Bob office in the same suite, and share a secretary.
- b. Alma is the billing attorney (*i.e.*, she prepares and sends out bills for the firm) for that client.
- c. Alma is the partner in charge of coordinating the firm's work for that client.
- d. Alma is the partner in charge of the representation of that client on that matter.
- e. Alma also represent the client in a different aspect of that matter.
- f. Alma also represents that client on a related matter.
- g. Alma is a senior partner, and she reviews Bob's work when it is time to determine profits for the next year.
- h. Alma is the chair of the litigation department.
- i. Alma is a member of the firm's executive committee.
- j. Alma is the firm's managing partner.

Would your answer change if the law firm were organized under either (i) the Revised Uniform Partnership Act, or (ii) the Connecticut LLP provisions discussed in *Kus v. Irving*?

KUS v. IRVING

46 Conn. Supp. 35, 736 A.2d 946 (Super. 1999)

HURLEY, Judge Trial Referee.

The two defendants, attorneys Nancy Z. Dubicki and Garon Camassar, claim in their motion for summary judgment that there is no genuine issue of material fact as to their liability and request, as a matter of law, that the motion be granted. The law firm is a limited liability partnership.

The plaintiff, Margaret Kus, claims that a third defendant, attorney Charles J. Irving, a partner in the firm of Irving, Dubicki and Camassar, induced her to sign a fee

agreement to pay him a fee of 25 percent of what he collected on the life insurance policy of the husband of the plaintiff before suit was filed and 33 percent of any proceeds after suit was brought. The policy had a death benefit of \$400,000. She claims that Irving had already received the \$400,000, but nevertheless filed suit to collect the larger fee of 33 percent. Irving then paid the plaintiff \$270,692.26 and took a fee of \$135,365.63, which the plaintiff claims was \$33,841.41 too high. The plaintiff sued all three partners in the firm.

Both Dubicki and Camassar have filed affidavits stating that they had no personal knowledge of the case or the dealings between Irving and the plaintiff until November 24, 1998, which was several days after the matter between the plaintiff and Irving was concluded. They claim that under General Statutes § 34-327, they are protected from liability for any actions by their partner, Irving.

Section 34-327 provides in pertinent part:

(c) ... a partner in a registered limited liability partnership is not liable directly or indirectly ... for any debts, obligations and liabilities ... chargeable to the partnership or another partner or partners ... arising in the course of the partnership business while the partnership is a registered limited liability partnership.

(d) The provisions of subsection (c) ... shall not affect the liability of a partner ... for his own negligence, wrongful acts or misconduct, or that of any person under his direct supervision or control.

In their affidavits, Dubicki and Camassar state that they had no personal knowledge of the dealings between the plaintiff and Irving, nor did they have any supervision or control of Irving. Furthermore, they state that under the partnership agreement, Irving retains all fees for his activities and does not share any of them with the other partners.

The plaintiff claims that the two defendants are guilty of negligence, wrongful acts and misconduct. She produced no affidavit or other documents, however, to support this claim. The court must, therefore, find that there is no genuine issue of material fact in this regard.

The plaintiff then claims that the two defendants violated various sections of the Rules of Professional Conduct. The court, however, cannot treat her mere assertions as evidence that they violated rule 5.1 of those rules. She claims they admitted knowledge of what happened and did not attempt to rectify it. All they admitted was knowledge after the transaction was concluded. Again, the plaintiff's claims are made without supporting affidavits.

Even if there were evidence of a violation of rule 5.1(a) and (c) of the Rules of Professional Conduct, the court finds § 34-327(d) supersedes both subsections of the rule except where the other person is under the partners' "direct supervision or control." Here, the sworn affidavits deny that this was the case. Accordingly, since the two defendants shared no benefit, did not have direct supervision or control over Irving and did not know about the matter until nine days after the funds were distributed, the court

finds that they are protected from liability by § 34-327(c).

The motion for summary judgment by defendants Dubicki and Camassar is granted.

Notes

Review the following provisions from these selected LLP statutes: Texas Revised Partnership Act § 308; Minnesota Statutes Ann. §§323.14 & .44; Calif. Corp. Code §§15002(g) & (I), 15006, 15015, 15049, 15052 & 15-53. In addition, review section 306(c), and 1001 to 1003 of RUPA.

1. Currently, all LLP statutes provide, either explicitly or implicitly, that a partner will continue to be liable for his or her own acts. There is considerable variation in the language used to explain when a partner will be liable for the acts of others. As originally written, the Texas statute dealt with this issue by specifying that the shield against personal liability for partners in an LLP prevents a partner from being liable the misconduct of others, so long as they are

not working under the supervision or direction of the first partner.

The statute contains the caveat that first partner will be liable if that partner:

(A) was directly involved in the specific activity in which the errors, omissions, negligence, incompetence, or malfeasance were committed by the other partner or representative; or

(B) had notice or knowledge of the errors, omissions, negligence, incompetence, or malfeasance by the other partner or representative at the time of occurrence and then failed to take reasonable steps to prevent or cure the errors, omissions, negligence, incompetence, or malfeasance.

Texas Revised Partnership Act §3.08(a). In 1997, the statute was revised to extend the limited-liability shield to *almost* all obligations of the partnership. Although the current language is inartfully drafted, arguably the statute continues vicarious partner liability for the torts under the circumstances described above. *Id.* at §§3.08(a)(1) & 3.08(a)(2).

2. Many state LLP statutes provide that a partner will continue to liable for the misconduct of those under the partner's "direct supervision and control." Some of these states also impose additional requirements in order for the "direct supervision and control" language to apply. For example, the Kansas statute provides that the limitation of liability in an LLP does not extend to liability for misconduct of another if the partner was exercising

direct supervision and control at the time the negligence, malpractice, wrongful acts and omissions or misconduct occurred.

Kan. Stat. Ann. § 56-315 (1994). Similarly, the Virginia statute requires that the "direct supervision and control" be in

the specific activity in which the negligence, malpractice, wrongful acts or misconduct occurred.

Va. Code Ann. § 50-15 (1995). The New York LLP Act provides that liability will exist if a partner was exercising

direct supervision and control while rendering professional services...."

N.Y. Partnership Law art. 3 § 26 (1995). One might ask whether the language of these statutes is any different in effect from the language used in the Texas statute.

3. A third group of state statutes omits any reference to potential liability for the acts of others. *See* Cal. Corp. Code §151015 (1996); Minn. Stat. §323.14 (1995). *See* also RUPA (1994) §306(c). It would, however, be incorrect to assume that a partner in an LLP formed under any of these statutes will never be liable for the misconduct of others. Even in an LLP, partners remain liable for their own misconduct, and that should include negligent hiring or supervision of others. In addition, courts in a state where the statute is silent on the issue of liability for the misconduct of others, even those under the first partner's direct supervision and control, might be more likely to find an affirmative duty to monitor the behavior of other partners. Obviously, if such a duty is found to exist, breach of that duty could support an action for personal liability.

4. In *Kus v. Irving*, the plaintiff argued that section 5.1 of the Connecticut Rules of Professional Conduct provided a basis for holding the other partners liable for the misconduct of the partner who had represented the client. That Rule provides as follows:

Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm shall make reasonable efforts to ensure 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 having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) 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.

As explained in the Commentary to Connecticut Rule 5.1:

The measures required to fulfill the responsibility prescribed in subsections (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures

may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

* * *

Subsection (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Id., Commentary. The Commentary also specifies that the question of whether a violation of Rule 5.1 subjects a lawyer to civil liability “is a question of law beyond the scope of these Rules.” *Id.*

For a detailed discussion of the issue of a law partner's obligation to monitor the conduct of others, see Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. Colo. L. Rev. 329 (1995).

5. In *Kus v. Irving*, the court held that, even if CRPC 5.1 (see Note 4) gave rise to civil liability, it was preempted by the provisions of the LLP law. Is the court correct in its conclusion? Section 34-327(d) of the Connecticut act at issue in *Kus* imposes liability for (i) a P's own “negligence, wrongful acts or misconduct”, and (ii) those of one under the partner's direct supervision and control. Similarly, the Texas LLP provisions only protect partners from liability for the acts of *others*. TRPA 3.08(a)(2). The RUPA LLP shield provides that partners are not liable for partnership obligations “solely by reason of being or so acting as a partner.” RUPA 306(c) (emphasis added). Does liability based on your own wrongful acts arise solely by reason of being or acting as a partner?