ORIGINAL

No. 24572-4-1

IN THE

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION I

GARY LIEN, Appellant,

vs

DON BARNETT and BARBARA BARNETT, husband and wife; COMMUNITY CHAPEL and BIBLE TRAINING CENTER, a non-profit association, JOHN DOE, I-XX; KATHY BUTLER, a married person, Respondents.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable John W. Riley, Judge

APPELLANT'S BRIEF

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TABLE OF CASES

STATUTES AND ORDINANCES

ASSIGNMENT OF ERROR

The trial court granted defendant's motion made pursuant to CR 12 (b)(6), to dismiss plaintiff's complaint.

ISSUE

1. Can plaintiff maintain a cause of action against the defendants for loss of consortium and negligent counseling?

STATEMENT OF CASE

Gary Lien filed suit against Donald Barnett and Barbara Barnett, husband and wife, and the Community Chapel and Bible Training Center. The complaint alleged:

1. That Gary Lien was married to Kathy Lien;
2. That Gary and Kathy Lien were members of the Community Chapel and Bible Training Center, where Don Barnett was the pastor;
3. That as Gary and Kathy Lien became more involved with church activities, they became close friends with Don Barnett;
4. That unknown to Gary Lien, Don Barnett had begun making sexual advances toward his wife, Kathy, in 1972 which behavior continued thereafter;
5. That Gary and Kathy Lien separated in 1975 and their marriage

eventually ended in divorce;

and

6. Gary Lien first learned of these events in April, 1986.

(CP pp. 64-65.)

In 1986, Kathy Butler, f/k/a Kathy Lien filed suit against Don Barnett and the Community Chapel and Bible Training Center. (CP pp. 1-20.) Gary Lien, in 1986, also filed suit against the same parties. (CP pp. 62-69.) Gary Lien alleged six causes of action. The first cause of action alleged negligence against Don Barnett as a pastor for making sexual advances towards Gary Lien's wife (CP p. 65.) The second cause of action alleged a loss of services of his wife due to the actions of Don Barnett. (CP p. 66.) The third cause of action was for intentional infliction of emotional distress and the fourth for the tort of outrage. (CP p. 66.) The fifth cause of action claimed that Community Chapel and Bible Training Center was liable for the acts of Don Barnett under the doctrine of respondeat superior and the sixth alleged that the Chapel was liable for failure to

properly supervise its employee, Don Barnett. (CP p. 67.)

Defendants moved for dismissal of Gary Lien's Complaint pursuant to CR 12 (b)(6).(CP pp. 21-24.) The thrust of the defense motion was that Gary Lien's complaint against Don Barnett Sounded in alienation of affections, a cause of action barred by case law as cited herein. This motion was granted and order entered on June 30, 1989, dismissing the complaint. (CP pp. 60-61.)

ARGUMENT

STANDARDS FOR MOTIONS UNDER CR 12 (b)(6)

The motion made by respondents was not a motion for summary judgment under CR 56, but a motion to dismiss for failure to state a claim upon which relief could be granted pursuant to CR 12 (b) (6). There are significant differences in the standards to be applied to motions brought under each rule. A motion made under CR 56 allows the parties to present additional evidence through affidavits. A motion made pursuant to CR 12 (b) (6) is a motion on the pleadings and no evidentiary matters outside the pleadings may be considered unless the court permits such evidence and the notice and pleading requirements are met for summary judgment motions. Lightner v. Balou, 59 Wn. 2d 856 (1962).

> Dismissal of a claim under Rule 12 (b) (6) is appropriate "only if it can be said that there is no state of facts which the plaintiff could prove in support of entitling him to

> relief under his claim." GoldSeal Chinchillas, Inc., v State, 69 Wn. 2d 828, 830, 420 P. 2d 698 (1966). See also Christensen v. Swedish Hosp. 59 Wn. 2d 545, 548, 368 P. 2d 897 (1962). Moreover,
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> > (T)he party who moves for judgment on the pleadings admits, for the purposes of the motion, the truth of every fact well pleaded by his opponent and the untruth of his own allegations which have been denied. Hodgson v. Bicknell, 49 Wn. 2d 130, 136, 298 P. 2d 844 (1956).

Barnum v. State, 72 Wn. 2d 928, 929-930 (1967).

Respondents brought the motion claiming that appellant's claims are not allowed under Lund v. Caple, 100 Wn. 2d 739, 675 P. 2d 226 (1984) (hereinafter "Lund"). Applying the rules quoted above, the facts alleged in the complaint must be admitted. Therefore, it is admitted that Don Barnett made sexual advances towards Gary's wife, and that Don Barnett owed a duty to both Gary and Kathy. As will be explained later, this gave rise to a cause of action on Kathy's part and on Gary's

part and these two causes of action are separate and distinct. Thus, the motion should be denied. This becomes even clearer if the court considers the excerpts from Don Barnett's deposition in the dissolution action between Kathy and Gary. (CP pp. 70-78.)

The appellant advanced several theories of liability against the respondents in his complaint. Each one of those were addressed below and will addressed here also.

CLAIM FOR MALPRACTICE AGAINST DON BARNETT

The complaint shows that Don Barnett owed a duty of care to both Kathy and Gary. As shown by his deposition testimony in the dissolution action between Kathy and Gary Lien, he was counseling both of them. Since it would be admitted for the purposes of this motion that Don Barnett did make sexual advances towards Kathy Lien, each action would clearly not fall within the standard of care for either a minister or a pastor. Since the Supreme Court has never established a standard of care for a pastor (Lund at 774), we can only argue

by analogy. In fact, Lund specifically recognizes such a cause of action:

> This opinion, however, should not be read as precluding an action against a counselor, pastoral or otherwise, in which a counselor is negligent in treating either a husband or wife.

Lund at 747. It would seen that the Court could certainly assume that the sexual advances Don Barnett made towards Kathy Lien fall outside any approved standard of care.

The point is that Gary Lien has a separate cause of action against Don Barnett for malpractice. Such a cause of action is separate and distinct from any alienation of affections claim. A motion under CR 12 (b)(6) cannot be granted simply because the facts alleged will support two causes of action: one allowed and one not.

ALIENATION OF AFFECTIONS

The bulk of the motion and the argument for dismissal are centered around this issue. Respondents relied mostly, if not completely, on

Lund. The arguments by the respondents concluded with the following in the Memorandum in Support of the Motion (CP p. 28):

> Consequently, Gary Lien's claims for negligent malpractice, loss of consortium and infliction of emotional distress fall directly within the holding in Lund. Despite what they are called, they are claims for alienation of affection, and they are barred.

Not only have respondents misread the holding in Lund, the legal analysis is also incorrect.

The Lund case involved a husband who sued a minister who had sexual relations with the husband's wife. He pled theories of outrage and negligent impairment of consortium. The wife did not join in the lawsuit, nor did she file an independent action. The Supreme Court found this very crucial. In discussing the case, the Court referred to the "impaired" spouse (the wife, in Lund), and the "deprived" spouse (the husband, in Lund) with respect to the parties in interest there. Thus, the "impaired" spouse did not file suit against the minister, only the "deprived" spouse. In this case, Kathy Butler, formerly Kathy

Lien, is the " impaired" spouse and Gary Lien the "deprived" spouse.

In addressing the husband's claim for negligent impairment of consortium, the Lund court posed two questions:

> May one spouse sue alone for loss of consortium? If so, are the allegations so similar to an alienation of affections lawsuit so as to be barred as a matter of policy?

Lund at 742.

With respect to the first question, the Court stated:

> Since an element of loss of consortium is a separate, direct injury to a spouse, most such cases involve the claims of both spouses. An example is Lundgren v. Whitney's Inc., supra, in which this Court allowed a wife to recover for loss of consortium damages. In that case, an action for negligence based on a truck accident in which the husband sustained personal injuries, both husband and wife were plaintiffs. The present case differs because the "impaired" spouse (the wife) is not a party to the lawsuit.

Lund at 743. In concluding its discussion on the first question, the Court Stated:

> The better rule is that a "deprived" spouse may sue for loss of consortium damages by either joining in a lawsuit with the spouse who sustained primary injuries or by bringing an independent suit.

Lund at 744. It should be remembered that a suit was brought by Kathy Butler, formerly Kathy Lien (CP pp. 1-20.). Gary Lien brought his own suit, which is the subject of this motion. Thus, Gary Lien is in compliance with the first rule of Lund.

In discussing the second question posed above, the Supreme Court looked at the substance of the plaintiff's complaint, rather than the labels put on the allegations by the plaintiff. After listing the elements of the tort of alienation of affections (set forth in defendants' brief). the Court stated:

> In this case those precise elements are presented in the husband's complaint. Wyman v Wallace, supra, however abolished that tort and appellant cannot maintain an action based solely upon such a theory.

Lund at 745. (emphasis added). In this case, Gary Lien's claim is not based at all on alienation of affections. It is based on negligence, infliction of emotional distress, outrage, and loss of consortium.

The Court then stated that it could look beyond the labels of the complaint and look at the nature of the claims. Lund at 745. The court then reviewed the Lund complaint and some case law dealing with the alienation of affections. After that, the Court listed the policy reasons for eliminating alienation of affections as a viable cause of action. The fifth reason appears to be the one the court focused on:

> The successful plaintiff succeeds in compelling what appears to be a forced sale of the spouse's affections.

Lund at 747. In dismissing Lund's complaint, the Court stated:

> Here, John Lund is suing because of alleged sexual misconduct that interfered with his marriage. His wife did not join in the lawsuit, which alone would not bar the action, but does indicate at least the possibility of a vengeful motive or a so-called "forced

> sale" on the part of a wronged husband. As such, this lawsuit is so similar to an alienation of affections action that as a matter of policy it falls within the prohibitions of Wyman v Wallace, supra.

Lund at 747. (emphasis added). The Court thus bases it's conclusion that the Lund complaint was one for alienation of affections on the fact that his wife didn't join in the suit. That is not the situation in the Lien case.

The basis for the Court's ruling becomes crystal clear in the final paragraph of the opinion, where the Court states it holding.

> This opinion, however, should not be read as precluding an action against a counselor, pastoral or otherwise, in which a counselor is negligent in treating either a husband or wife. It is conceivable that a malpractice action would be appropriate where a counselor fails to conform to an appropriate standard of care, injures the patient/spouse which in turn results in loss of consortium damages to the other spouse. Where, however, the alleged underlying tort is based upon an extramarital relationship with the "impaired" spouse and the "impaired" spouse does not desire to assert a claim, such

> an action becomes in essence a suit for alienation of affections. Absent the "impaired" spouse's claims, remaining allegations amount to an alienation of affections action, i.e., a viable marital relationship, wrongful interference with the relationship by a third person, loss of consortium and a causal connection. Therefore, we hold the prohibition of alienation of affections actions extends to those cases in which a lone spouse sues a third party for alleged sexual misconduct with his and her spouse and seeks only loss of consortium damages.

Lund at 747 (emphasis added).

It is clear from the language of the Lund case that it bars claims based on loss of consortium alone in those instances where the "impaired" spouse fails to file suit. In this case, both spouses filed suit. Looking at the language of the decision, it appears that Lund does not preclude Gary Lien's case. In fact, it would seem to actually permit the claim.

CONCLUSION

The basis of the trial court's ruling was that the appellant's case was nothing more than a case of alienation of affections (RP. pp. 26-27). However, appellant has shown here, as well as below, that the case law as set forth in Lund does not automatically disqualify a party from bringing suit against a tortfeasor for loss of consortium and malpractice. Appellant therefore requests that the decision of the trial court be reversed and the case remanded for trial.

Respectfully submitted

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