24572-4

DECLARATION OF MAILING

ON THIS DAY I DEPOSITED IN THE UNITED STATES MAIL A PROPERLY STAMPED AND ADDRESSED ENVELOPE TO THE ATTORNEYS OF RECORD OF ~~PLAINTIFF/DEFENDANT~~, CONTAINING A COPY OF THE DOCUMENT ON WHICH THIS DECLARATION APPEARS. I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON AND THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED AT _____ THIS _____ DAY OF _____, 19__.

SIGNATURE

No. 24572-4-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GARY LIEN

Appellant,

vs.

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

Respondents.

BRIEF OF RESPONDENT COMMUNITY CHAPEL & BIBLE TRAINING CENTER

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I. COUNTER-STATEMENT OF CASE

On July 31, 1986, Gary Lien (hereinafter "Lien" or "Appellant") filed suit against Donald and Barbara Barnett, the Community Chapel & Bible Training Center (hereinafter "Chapel" or "CCBTC"), John Doe and Jane Doe I-XX, and Gary Lien's former wife, Kathy Butler (hereinafter "Butler"). Lien, in the factual allegations of his complaint, claimed as follows:

1. That he had a marital relationship with Kathy Butler;
2. That Donald Barnett interfered with that marital relationship;
3. That Lien suffered the breakup of his marriage and lost his wife's affection and consortium; and
4. That Donald Barnett's conduct caused the dissolution of Lien and Butler's marriage.

(CP pp. 64-65[1]).

Lien's complaint alleged six causes of action: (1) Negligence (against Donald Barnett); (2) Loss of Kathy Butler's services; (3) Intentional infliction of emotional distress; (4) Outrage; (5) Negligence (against CCBTC under the

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[1] Clerk's papers are designated herein as "CP". See RAP 10.4(f).

doctrine of respondeat superior; and (6) Negligent supervision of Donald Barnett by the Chapel. (CP pp. 65-68.)

On June 30, 1989, defendants Donald and Barbara Barnett and CCBTC moved in the trial court for dismissal of Lien's claims pursuant to CR 12(b)(6) (CP pp. 21-24.) After thoughtfully considering the motion, The Honorable John Riley dismissed plaintiff's complaint. The court ruled that Lien's complaint failed to state a claim, because however the complaint's causes of action were labeled, they were, in reality, claims for alienation of affections, an outlawed cause of action in Washington.

Lien appeals.

II. ARGUMENT

A. As The Trial Court Correctly Perceived, All Of Lien's Claims, No Matter How Labeled, Are Really Claims For Alienation Of Affections And Must Be Dismissed

As he has done from the beginning of this lawsuit, Lien, in his opening brief, attempts to convert alienation of affection claims into something else. He seems to believe that by relabeling those claims he can magically transform them into something they are not. Lund v. Caple, 100 Wn.2d 739, 675 P.2d 226 (1984) instructs us that regardless of what claims are called, a trial court must look at the allegations and determine what actually has been pled. Here, the trial court did just that: it looked at the pleadings; determined what actually had been alleged - notwithstanding the

plaintiff's characterization of the claims; compared the allegations against the elements of the tort of alienation of affections: found that the allegations matched the elements of that tort; and, dismissed the complaint.

Other courts also have rejected plaintiffs' attempts to avoid the effect of a legal bar by pleading alternative theories of recovery in lieu of the barred action. Strock v. Pressnell, 527 N.E.2d 1235 (Ohio 1988). As the court in Adrianos v. County Tractor Company, 97 N.E.2d 549 (Ohio 1951) stated,

> ... the limitation is imposed on the cause of action and the form in which the action is brought is immaterial.

97 N.E.2d at 550.

Despite his best efforts, Lien cannot confuse the fact that Lund controls this case and Lien's attempts to mischaracterize Lund's holding should not prevail.

Lien ignores the plain meaning of Lund and claims that whether his former wife has filed suit against Barnett and CCBTC is the only factor to consider when deciding whether his claims should survive. However, Lund states that, whether the "impaired" spouse, in this case Butler, participated in the lawsuit is not dispositive, but merely a factor to be considered.

> His wife did not join the lawsuit which alone would not bar the action but does indicate at least the possibility of

> vengeful motive or a so-called "forced sale" on the part of the wronged husband.

100 Wn.2d 747. The court in Wyman v. Wallace, 94 Wn.2d 99, 615 P.2d 452 (1980) characterized "vengeful motive" as a policy a reason behind the outlawing of alienation of affection claims. 94 Wn.2d at 105. Though respondents need not show it in order to prevail, evidence of vengeful motive is present here.[2] Gary Lien has named Butler as a defendant in this action.

There is no case nor can appellant direct the court to any holding that categorizes "vengeful motive" as an element of or a prerequisite to finding the existence of an alienation of affections claim. Since Lien has pled the same elements set forth in Carrieri v. Bush, 69 Wn.2d 536, 419 P.2d 132 (1966), the trial court's ruling should be affirmed.

At page 8 of his opening brief, Lien claims that since the Lund court left open the question of whether a pastor could be sued for negligent counseling, his claim should survive. The flaw in this argument is that Lien does not claim that Barnett's negligent counseling or ministering

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[2] Carrieri v. Bush, 69 Wn.2d 536, 419 P.2d 132 (1966) stated that the elements of the tort of alienation of affections are: (1) an existing marriage relation; (2) a wrongful interference with the relationship by a third person; (3) a loss of affection or consortium; and (4) a causal connection between the third party's conduct and the loss. Carrieri does not hold that "vengeful motive" is an additional element of that tort.

caused him damage. Rather, his complaint specifically states claims that Lien's damage is directly attributable to Donald Barnett and Kathy Butler's sexual relationship. Therefore, Wyman v. Wallace and Lund v. Caple require dismissal.

Strock v. Pressnell, 527 N.E.2d 1235 (Ohio 1988) involves nearly identical facts to the case at bar. Richard Strock and his wife, Suzanne, were having marital differences. They went to Minister James Pressnell for marriage counseling. During the final three to four weeks of counseling, Pressnell allegedly engaged in consensual sexual relations with Suzanne. Plaintiff's marriage ended shortly after he discovered the affair. Strock then brought suit against both Pressnell and his church. The suit against Pressnell alleged clergy malpractice, breach of fiduciary duty, fraud, misrepresentation, nondisclosure and intentional infliction of emotional distress. The suit against the church alleged liability based on agency principles and claims of negligent supervision and negligent training of Pressnell. 527 N.E.2d at 1236.

After holding that plaintiff was barred from bringing those claims against Pressnell because plaintiff was, in reality, alleging an alienation of affections claim, the Supreme Court of Ohio turned to the claims against the church, Pressnell's employer.

> The final issue we address is whether the church can be held liable to appellant on either agency principles or for negligent supervision or training or Pressnell.
>
> It is axiomatic that for the doctrine of respondeat superior to apply, an employee must be liable for a tort committed in the scope of his employment. Likewise, an underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer. Because no action can be maintained against Pressnell in the instant case, it is obvious that any imputed actions against the church are also untenable.

527 N.E.2d at 1244. See also, Brink v. Martin, 50 Wn.2d 256, 310 P.2d 870 (1957) (principal cannot be held derivatively liable if the agent is not liable).

Likewise, since an alienation of affections claim cannot be maintained against the Barnetts, the trial court was correct in ruling that claims against CCBTC could not proceed and should be dismissed.

B. The Lower Courts Dismissal Of Lien's Outrage Claim Should Be Affirmed

In his brief, Lien fails to address the dismissal of his claim based on the tort of outrage. Possibly, on this claim, he concedes the correctness of the lower court's ruling. Every outrage case in Washington insists that a plaintiff, in order to state that claim, must have been in defendant's presence while the defendant was performing his outrageous act. See Contreras v. Crowne Zellerbach Corp., 88 Wn.2d 735,

737 n.1 565 P.2d 1173 (1977); Grimsby v. Samson, 85 Wn.2d 52, 530 P.2d 291 (1975). In his complaint and when responding to defendants' motion to dismiss below, Lien conceded that he did not learn of the alleged affair between Barnett and Butler until April 22, 1986. By his own admission, then he was not present at the alleged tryst. (CP 65.)

Since Lien cannot meet the "presence" requirement in order to state an outrage claim, the lower court's dismissal of that claim should be affirmed.

III. CONCLUSION

Since Lien's complaint, when stripped of all its crafty labels, states a cause of action for alienation of affections, the court should affirm the lower court's dismissal of Lien's complaint. Additionally since Lien is unable to establish the "presence" element of his outrage claim, this court should affirm the lower court's dismissal of that claim as well.

Respectfully submitted this 5th day of March, 1990.

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