

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.

RESPONDENT BARNETTS' BRIEF

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I. STATEMENT OF CASE

Gary Lien's marriage to Kathy (Lien) Butler failed in 1975. CP 65. In 1986, Gary Lien brought an action for the failure of his marriage naming Kathy Butler, Don and Barbara Barnett, the Community Chapel and Bible Training Center, and unidentified parties as defendants. CP 63.

In a separate action, Kathy Butler and her second husband Stephen Butler brought an action against Don and Barbara Barnett, the Community Chapel and Bible Training Center, and unidentified parties for interference with their marriage. CP 1-20.

The actions brought by Kathy Butler and Gary Lien were consolidated by the King County Superior Court for pre-trial procedure purposes. RP 22.

The Barnetts and the Community Chapel moved to dismiss the complaint of Gary Lien for failure to state a claim. CP 21, CP 43.

Dismissal was urged upon two basises. First, Gary Lien's claims are merely claims for alienation of affection. CP 26-28, CP 55-57, RP 4-7. Second, Gary Lien's claims for Outrage and Intentional

Infliction of Emotional Distress are merged, and such actions cannot be stated in the absence of presence. RP 7-8, CP 28, CP 57-58.

In response to the dismissal motion brought pursuant to CR 12(b)(6), Gary Lien submitted the affidavit of Alvin Mayhew. The Barnetts and the Community Chapel each timely moved to strike this affidavit. CP 1-2 (Designated by Timothy Donaldson), CP 58, RP 9-10. The court did not rule upon the motion to strike. RP 25. However, it did grant the motion to dismiss for failure to state a claim upon the basis of plaintiff's complaint. CP 60-61.

II. ARGUMENT

The only issues that Gary Lien raises on appeal relate to his claims for loss of consortium and negligent counseling. See, APPELLANT'S BRIEF page 2. Gary Lien has failed to raise issues, make arguments, and cite authority with respect to either dismissal of his claims for intentional infliction of emotional distress and outrage or the absence of presence. Therefore, these issues may not now be argued and will not be considered in

this appeal. Transamerica Ins. v. United Pacific Ins., 92 Wn.2d 21, 28-29, 593 P.2d 156 (1979).

1. ALIENATION OF AFFECTIONS.

The dismissal of Gary Lien's claims for negligent counseling and loss of consortium was proper.

A. VENGEFUL MOTIVE

The heart of Gary Lien's argument on appeal is that the bar upon claims for alienation of affections applies only when an ex-spouse sues alone. Lien relies upon Lund v. Caple 100 Wn.2d 739, 675 P.2d 226 (1984). Lien's own argument, though, further demonstrates that his claim is for alienation of affections.

In Lund the Washington Supreme Court did look at John Lund's failure to join his ex-spouse. However, the court expressly stated that this was not the reason for dismissal. The court looked at the failure to join as an indication of vengeful motive.

His wife did not join the lawsuit, which alone would not bar the action, but does indicate at least the possibility of a vengeful motive or so-called "forced sale" on the part of a wronged husband.

Lund at 747.

Gary Lien's analysis of the Lund case requires this court to base its decision upon who was joined to the lawsuit. Under this analysis, Gary Lien's vengeful motive is even clearer than John Lund's. John Lund simply failed to join his ex-wife. Lund at 747. Gary Lien sued his ex-wife. In the present case, Gary Lien named his ex-wife, Kathy Butler as a defendant. CP 63-69. In Lund, vengeful motive was inferred by non-action. In this case it is apparent directly through action. It does not need to be inferred.

B. TECHNICAL DISTINCTIONS CONTRARY TO LUND.

However, vengeful motive is not the determinative issue. It is not an element of an alienation claim. Carrieri v. Bush, 69 Wn.2d 536, 542, 419 P.2d 132 (1966). It is simply a policy reason behind the abolishment of such actions. Wyman v. Wallace, 15 Wn.App. 395, 399, 549 P.2d 71 (Div. One, 1976), aff'd in Wyman v. Wallace, 94 Wn.2d 99, 615 P.2d 452 (1980).

Only a misreading of Lund would allow a technical distinction to be drawn between an

alienation claim in which the alienated spouse is joined and an alienation claim in which the alienated spouse is not joined.

The express holding of Lund requires a court to look beyond the labels given to a claim.

We believe, however, that the policies underlying Wyman require us to go beyond the mere labels on appellant's claim and consider the nature of his claims.

Lund at 745. The rationale behind Lund is that a pleader cannot rely upon technical distinctions, and a court must look to the real nature of a claim. If a claim is really for alienation of affections, it is barred despite what it is called. Lund at 745.

Gary Lien's claims are really for alienation of affections. His complaint alleges facts which underlie both his claim for negligent counseling and loss of consortium. CP 65, CP 66. These allegations are:

1. That Gary Lien had a marital relationship with Kathy Butler.

That prior to 1975, Kathy Butler and Gary Lien were husband and wife.

CP 64.

2. That Don Barnett interfered with this marital relationship.

Unknown to Gary Lien, Don Barnett was making sexual advances towards his wife, Kathy Lien. This began sometime in 1972 and continued thereafter.

CP 65.

3. That Gary Lien suffered a loss of his wife's affection and consortium.

In 1975, Kathy and Gary Lien separated and their marriage eventually ended in divorce.

CP 65.

4. That Don Barnett's conduct was the cause of the marital breakup.

The cause of the divorce was the pressure and guilt suffered by Kathy Lien as a result of the advances made by Don Barnett.

CP 65.

These allegations are precisely the elements of alienation of affections. These elements are:

- (1) an existing marriage relation;
- (2) 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, supra at 542.

Despite what Gary Lien calls his claims, they are still claims for alienation of affections. As the court wrote in Lund, which is factually indistinguishable from the present case:

Appellant claims that Caple's sexual relations with appellant's wife constitute a breach of his professional duties as a counselor that resulted in emotional distress to Nanette. This emotional distress, in turn, so affected Nanette that appellant allegedly lost the benefit of her services and companionship. In essence, Lund seems to claim that his wife's extramarital relations with Caple damaged the Lunds' marital relationship. As such that claim clearly would satisfy the elements of an action for alienation of affections quoted above.

Lund, at 745. Therefore the labels must be disregarded, the claims must be treated as claims for alienation of affections, the claims are barred, and dismissal was proper. See, Strock v. Pressnell, 38 Ohio St.3d 207, 527 N.E.2d 1235 (1988).

C. PUBLIC POLICY

In 1975, Gary Lien's marriage failed. Over 10 years later, he filed this action seeking damages from those who he blames for the breakup, thus, asking the court to investigate the causes of his failed marriage.

The Washington Legislature rejected the notion of fault divorce in 1973. It repealed fault grounds for divorce and established a no-fault system. Laws of 1973, 1st Ex. Sess., ch. 157.

Thereafter, this court found that the concept of third party liability for a marital breakup was incompatible with present day society. It abolished actions for alienation of affections. Wyman v. Wallace, 15 Wn.App. 395, 549 P.2d 71 (Div. One, 1976), aff'd in Wyman v. Wallace, 94 Wn.2d 99, 615 P.2d 452 (1980). The Supreme Court followed the reasoning of this court in stating the public policy behind disallowing such actions:

[T]he action should be eliminated for the following reasons: (1) The underlying assumption of preserving marital harmony is erroneous; (2) The judicial process is not sufficiently capable of policing the often vicious out-of-court settlements; (3) The opportunity for blackmail is great since the mere bringing of an action could ruin a defendant's reputation; (4) There are no helpful standards for assessing damages; and (5) The successful plaintiff succeeds in compelling what appears to be a forced sale of the spouse's affections.

Wyman 94 Wn.2d 99, at 105.

In 1982, Robert Irwin argued to this court that a man still possessed a property right in his

wife despite the abolishment of actions for claim to her affections. This court disagreed, writing at page 515:

Neither wives nor husbands are property. The love and affection of a human being who is devoted to another human being is not susceptible to theft. There are simply too many intangibles which defy the concept that love is property.

Irwin v. Coluccio, 32 Wn.App 510, 648 P.2d 458 (Div. One, 1982).

It is arcane to suggest that the acts of one person can be blamed for the failure of a marriage. The decisions of this court in Wyman and Irwin, the decisions of the Washington Supreme Court in Wyman and Lund, and the repeal of the fault divorce system by the Washington Legislature all manifest that the institutions of this state should not be utilized to investigate the cause of a marriage failure. No common law remedy overrides these public policy considerations. RCW 4.04.010.

Gary Lien wants to affix blame for his divorce of 15 years ago. The institutions of this state do not look for such fault. As this court wrote:

To us the action diminishes human dignity. It inflicts pain and humiliation upon the innocent, monetary

damages are either inadequate or punitive, and the action does not prevent human misconduct itself. In our judgment, the interests which the action seeks to protect are not protected by its existence, and the harm it engenders far outweighs any reasons for its continuance.


Wyman v. Wallace, 15 Wn.App. 395, 401, 549 P.2d 71
(Div. One, 1976).

III. CONCLUSION

The allegations underlying Gary Lien's complaint are for alienation of affections. Therefore, his claims for loss of consortium and negligent counseling are barred despite their labels. Dismissal was proper, and the Barnetts request that the trial court be affirmed.

DATED THIS SIXTH day of March 1990.


EVANS, CRAVEN & LACKIE, P.S.

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CERTIFICATE

I certify that I mailed a copy of the foregoing Respondent's Brief to Alvin D. Mayhew, Jr., Gary Lien's attorney, at 1016 Main Street,

Sumner, Washington 98390, and to Anthony D. Shapiro, the Community Chapel's attorney at 212 Watermark Tower, 1109 First Avenue, Seattle, Washington 98101, postage prepaid, on the 7th day of March, 1990.


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