

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Other Civil

LaRae Lundeen Fjellman and Associated
Bodywork and Massage Professionals,

Plaintiffs,

v.

Dr. Sanne Magnan, individually and in her
official capacity as Commissioner of Health for
the State of Minnesota, and Diane Mandernach,

Defendants.

Case No. _____

COMPLAINT

For their Complaint, Plaintiffs LaRae Lundeen Fjellman (“Mrs. Fjellman”) and Associated Bodywork and Massage Professionals (“ABMP”) (collectively “Plaintiffs”), state and allege as follows:

NATURE OF ACTION

1. In this action, Plaintiffs seek declaratory judgment, injunctive relief, and damages on the grounds that Minnesota Statute § 146A.08, subd. 1(d), which prohibits complementary and alternative health care providers from engaging in acts of private, consensual, noncommercial marital and nonmarital sex with a former client within two years of the termination of the professional relationship, violates the rights to privacy, equal protection, and economic liberty guaranteed by the Minnesota and United States Constitutions. Plaintiffs do not challenge § 146A.08 as applied to commercial sexual conduct and likewise do not challenge other Minnesota statutes criminalizing forced or nonconsensual sexual activity or sexual activity involving minors, which are separate and distinct from § 146A.08.

2. In this action, Plaintiffs also seek declaratory judgment, injunctive relief, and damages on the grounds that Minnesota Statute § 146A.08, subd. 1(q), on its face and as applied to prohibit social contact and friendship between a massage professional and a client and to prohibit a massage professional from accepting tips from a client, or exchanging presents with a client, is unconstitutionally overbroad and vague.

PARTIES AND VENUE

3. Mrs. Fjellman is a massage therapist. She owns and operates a business in Lindstrom, Minnesota called "The Balanced Body," where she offers massage therapy services. Plaintiff is married to a former client, Kirk Fjellman ("Mr. Fjellman"). Within two years of ending their professional relationship, Plaintiff engaged with her husband in private, consensual, noncommercial, marital and nonmarital sex, which is prohibited by § 146A.08. Based on a complaint by Mr. Fjellman's ex-wife, Defendant Diane Mandernach, by and through agents associated with the Department of Health, investigated Plaintiff and subjected her to disciplinary proceedings for engaging with her husband in private, consensual, noncommercial marital and nonmarital sex prohibited by § 146A.08.

4. ABMP is an employee owned, Colorado corporation based in Evergreen, Colorado. It is the largest national association dedicated to advancing the massage and bodywork profession, providing practice support, ethical standards, legislative advocacy, and public education. ABMP has 61,000 members nationwide and 1,800 members who reside in the State of Minnesota.

5. Defendant Dr. Sanne Magnan is sued individually and in her official capacity as Commissioner of Health for the State of Minnesota, who is charged with enforcing § 146A.08.

6. Defendant Diane Mandernach, former Commissioner of Health for the State of Minnesota who was charged with enforcing § 146A.08, is sued individually.

7. Venue is appropriate in this Court because Plaintiffs' constitutional rights have been violated in Ramsey County.

JURISDICTION

8. This Court has jurisdiction to decide Plaintiffs' claims under the Constitution of the State of Minnesota pursuant to the Uniform Declaratory Judgments Act, Minn. Stat. § 555.01 et seq.

9. This Court has jurisdiction to decide Plaintiffs' claims under the United States Constitution pursuant to 42 U.S.C. § 1983.

FACTUAL ALLEGATIONS

10. Beginning in or about October 2000 and ending on or about April 24, 2002, Mrs. Fjellman provided massage therapy services to Mr. Fjellman. During that time, Mrs. Fjellman and Mr. Fjellman were not dating and not married to one another, and they had no sexual relationship of any kind with one another.

11. Mr. and Mrs. Fjellman began dating in or about July 2002, approximately three months after Mr. Fjellman's final massage therapy appointment. When they began dating, Mr. and Mrs. Fjellman agreed that Mrs. Fjellman would no longer serve as Mr. Fjellman's massage therapist.

12. Mr. and Mrs. Fjellman engaged in sexual intercourse for the first time in October 2002, approximately six months after Mr. Fjellman's final massage therapy session.

13. Mr. and Mrs. Fjellman became engaged in or about March 2003, approximately 10 months after Mr. Fjellman's final massage therapy session.

14. Mr. and Mrs. Fjellman were legally married in September 2003, approximately 16 months after Mr. Fjellman's final massage therapy session.

15. Mr. Fjellman's ex-wife filed a written complaint against Mrs. Fjellman with the Minnesota Department of Health on or about July 23, 2003, approximately 14 months after Mr. Fjellman's final massage therapy session. Among other things, Mr. Fjellman's ex-wife complained that Mr. and Mrs. Fjellman had engaged in "an inappropriate, unethical relationship," and that "this relationship included hugging, kissing, gift giving, dining together, vacationing together, and eventually Kirk and LaRae living together." In response to this complaint, the Defendant Mandernach and her agents began an investigation into Mr. and Mrs. Fjellman's relationship.

16. On May 14, 2004, more than two years after Mr. Fjellman's final massage therapy appointment and more than eight months after Mr. and Mrs. Fjellman were married, Defendant Mandernach and her agents subjected Mrs. Fjellman to a tape-recorded interview and questioned Mrs. Fjellman about her sexual relationship with her husband, her friendships with other massage therapy clients, her practice of exchanging gifts with clients, and her practice of accepting tips from clients.

17. After that interview, Defendant Mandernach and her agents caused Mrs. Fjellman to undergo psychological testing by psychologist Gary Schoener. Mrs. Fjellman agreed to submit to the testing in order to avoid losing her ability to practice in Minnesota. Mrs. Fjellman paid the cost of \$594 for the testing.

18. On or about December 15, 2004, Mr. Schoener provided a report on Mrs. Fjellman to Defendant Mandernach and her agents. Among other things, Mr. Schoener found as follows:

Based on my assessment I see no reason to believe that [Mrs. Fjellman] is not competent and able to practice massage therapy safely. I did not find any emotional or mental disorder which would put clients at risk. The sort of overlapping relationships that she cites are common in rural and small town practice and in and off [sic] themselves do not represent violations.

I believe that [it] is more likely than not that the rules she violated—handing out the Client's Bill of Rights and abstaining from a sexual involvement with a former client for two years post-termination—were not ones known to her. I also believe that these are not intuitive rules which a reasonable and prudent practitioner would know or presume [in the] absence of knowledge of a statute or rule.

Mr. Schoener's Report is attached hereto as Exhibit A.

19. On the basis of its investigation, Defendant Mandernach and her agents charged Mrs. Fjellman with violations of Minn. Stat. § 146A.08, including:

- a. Violating Minn. Stat. § 146A.08, subd. 1(d) by engaging in sexual relations with Mr. Fjellman.
- b. Violating Minn. Stat. § 146.08, subd. 1(q) by continuing a professional relationship with clients "when her objectivity is impaired." On information and belief, the conduct constituting the alleged violation of this provision included Mrs. Fjellman's practices of accepting tips from clients, exchanging gifts with clients, and maintaining personal friendships with clients, including Mr. Fjellman.
- c. Violating Minn. Stat. § 146A.08, subd. 1(r) by failing to provide clients with a "client bill of rights" containing items set forth in Minn. Stat. § 146A.11.

20. On various occasions, Defendant Mandernach and her agents asked Mrs. Fjellman to admit these charges and to agree to disciplinary sanctions. Mrs. Fjellman did not enter into such an agreement.

21. In proceedings before an Administrative Law Judge, Defendant Mandernach and her agents sought summary disposition with respect to the claims set forth above. The

Administrative Law Judge recommended that summary disposition be granted in favor of Defendant Mandernach with respect to the charges under Minn. Stat. § 146A.08, subds. 1(d) and (r), but refused to grant summary disposition on the record before her as to the alleged violation of subd. 1(q). The Administrative Law Judge's Ruling is attached hereto as Exhibit B.

22. On January 17, 2007, Defendant Mandernach's agent, Adviser to the Commissioner Patricia Winget, issued an Order, attached hereto as Exhibit C, requiring that Mrs. Fjellman engage in no sexual conduct with a complementary and alternative health care client or former client in violation of Minn. Stat. § 146A.08, subd. 1(d), to provide clients with a client bill of rights in conformity with Minn. Stat. § 146A.11, and to pay a civil penalty in the amount of \$500.

23. On January 31, 2007, Mrs. Fjellman, through counsel, sent a letter to Ms. Winget attached hereto as Exhibit D stating that Mrs. Fjellman intended to seek judicial review of the January 17, 2007 Order and requesting that enforcement of that Order be stayed pending Mrs. Fjellman's petition for writ of certiorari to the Minnesota Court of Appeals.

24. On February 9, 2007, shortly before Mrs. Fjellman was to file her petition for writ of certiorari, Ms. Winget issued an Order Rescinding Order Dated January 17, 2007 ("Rescinding Order"), attached hereto as Exhibit E. Among other things, the Rescinding Order stated as follows:

[T]he facts of this case, taken as a whole, clearly do not constitute the egregious mischief or exploitation that the legislature sought to protect the public from when it enacted Chapter 146A. The record does not support that Respondent somehow took advantage of her position as a provider of alternative health care when she engaged in sexual contact with a former client, whom she later married. Most importantly, there is nothing in the record [to suggest] that Respondent poses any future threat to the public. As I noted in the January 17, 2007 Order, during the course of the investigation, Respondent subjected herself, at her expense, to a psychological examination by the Department's expert witness. The expert witness declared Respondent capable of safely practicing massage therapy and not posing harm to the public.

25. As a result of the Department's investigation and disciplinary process, Mrs. Fjellman has suffered both monetary and nonmonetary damages.

26. As a prevailing party in the disciplinary process, Mrs. Fjellman filed a request for attorneys' fees and expenses pursuant to the Minnesota Equal Access to Justice Act and settled her claims for attorneys' fees and expenses associated with the disciplinary process with the Department of Health in the amount of \$5,800. A copy of the settlement agreement is attached hereto as Exhibit F. The settlement agreement did not bar Mrs. Fjellman from bringing this action or from seeking monetary or non-monetary damages.

27. Mrs. Fjellman currently has personal friendships with many of her clients, and she sometimes has social interactions with her clients outside the therapist-client relationship. On information and belief, Defendant Magnan or her agents believe that such conduct violates Minn. Stat. § 146A.08, subd. 1(q). Mrs. Fjellman fears that she will be subject to disciplinary action for engaging in these constitutionally protected activities. Mrs. Fjellman has also curtailed her personal friendships with her clients and her social interactions with her clients for fear of being subject to disciplinary action for engaging in these constitutionally protected activities.

28. Mrs. Fjellman occasionally accepts tips from or exchanges gifts with clients. On information and belief, Defendant Magnan or her agents believe that such conduct violates Minn.

Stat. § 146A.08, subd. 1(q). Mrs. Fjellman fears that she will be subject to disciplinary action for engaging in this conduct.

29. ABMP has members who reside in the State of Minnesota who are aware of Minn. Stat. § 146A.08, subd. 1(d), know someone who has violated this law, have heard of the Defendant Mandernach's investigation and disciplinary action against Mrs. Fjellman, and are concerned that Defendant Magnan and her agents may investigate and discipline them or someone they know for violating this law. In addition, some of ABMP's members who reside in Minnesota have considered getting involved in a personal relationship with a former client within two years of ending the professional relationship, but did not do so for fear of being investigated and disciplined under this law. ABMP therefore has members who would have standing to sue in their own right; the interests ABMP seeks to protect are germane to the organization's purpose and mission of serving as advocates for its members and protecting their ability to practice; and neither the claim asserted nor the relief requested on behalf of ABMP's members requires the participation of individual members in the lawsuit.

CAUSES OF ACTION

COUNT ONE

30. Plaintiffs restate and reallege paragraphs 1 through 29 of this Complaint.

31. Minn. Stat. § 146A.08, subd. 1(d), on its face and as applied to private, consensual, noncommercial marital and nonmarital sex with a former client within two years of ending the professional relationship, violates the right of privacy guaranteed by the United States and Minnesota Constitutions.

32. Plaintiffs seek declaratory and injunctive relief. Plaintiffs have no adequate remedy at law and damages alone cannot fully compensate Plaintiffs for their injuries. Unless

enjoined by the Court, Defendant Magnan and her agents will continue to infringe Plaintiffs' constitutionally protected rights and thereby cause irreparable injury.

COUNT TWO

33. Plaintiffs restate and reallege paragraphs 1 through 32 of this Complaint.

34. Minn. Stat. § 146A.08, subd. 1(d), on its face and as applied to private, consensual, noncommercial marital and nonmarital sex with a former client within two years of ending the professional relationship, violates the right to equal protection of the laws guaranteed by the United States and Minnesota Constitutions because it treats unlicensed complementary and alternative health care practitioners differently from other health care practitioners.

35. Plaintiffs seek declaratory and injunctive relief. Plaintiffs have no adequate remedy at law and damages alone cannot fully compensate Plaintiffs for their injuries. Unless enjoined by the Court, Defendant Magnan and her agents will continue to infringe Plaintiffs' constitutionally protected rights and thereby cause irreparable injury.

COUNT THREE

36. Plaintiffs restate and reallege paragraphs 1 through 35 of this Complaint.

37. Minn. Stat. § 146A.08, subd. 1(d), on its face and as applied to private, consensual, noncommercial marital and nonmarital sex with a former client within two years of ending the professional relationship, violates the right to economic liberty guaranteed by the due process clauses of the United States and Minnesota Constitutions.

38. Plaintiffs seek declaratory and injunctive relief. Plaintiffs have no adequate remedy at law and damages alone cannot fully compensate Plaintiffs for their injuries. Unless enjoined by the Court, Defendant Magnan and her agents will continue to infringe Plaintiffs' constitutionally protected rights and thereby cause irreparable injury.

COUNT FOUR

39. Plaintiffs restate and reallege paragraphs 1 through 38 of this Complaint.

40. Minn. Stat. § 146A.08, subd. 1(q), on its face and as applied to prohibit unlicensed complementary and alternative health care practitioners from having social contact with a client, accepting tips from a client, or exchanging presents with a client on the grounds that such activities impair the objectivity of the practitioner, is unconstitutionally overbroad and vague, and it gives Defendant Magnan and her agent arbitrary discretion to prohibit protected speech and associational activities in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the Minnesota Constitution.

41. Plaintiffs seek declaratory and injunctive relief. Plaintiffs have no adequate remedy at law and damages alone cannot fully compensate Plaintiffs for their injuries. Unless enjoined by the Court, Defendant Magnan and her agents will continue to infringe Plaintiffs' constitutionally protected rights and thereby cause irreparable injury.

WHEREFORE, Plaintiffs respectfully request that judgment be entered as follows:

A. Declaring that Minn. Stat. § 146A.08, subd. 1(d), violates the rights of privacy, due process, and equal protection guaranteed by the United States and Minnesota Constitutions and is therefore void as unconstitutional;

B. Permanently enjoining Defendant Magnan and her agents and subordinates from enforcing Minn. Stat. § 146A.08, subd. 1(d), against consenting adults who engage in private, consensual, noncommercial, marital and nonmarital sex;

C. Declaring that Minn. Stat. § 146A.08, subd. 1(q), on its face and as applied, is unconstitutionally overbroad and vague and violates the right to freedom of speech and association;

- D. Permanently enjoining Defendant Magnan and her agents and subordinates from enforcing Minn. Stat. § 146A.08, subd. 1(q);
- E. Awarding Mrs. Fjellman's damages in an amount to be determined at trial;
- F. Awarding Plaintiffs' reasonable costs and attorneys' fees herein pursuant to 42 U.S.C. § 1988; and
- G. Granting such other and further relief as the Court deems just and equitable.

Dated: November 15, 2007

GREENE ESPEL, P.L.L.P.

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ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, subdivision 2, to the party against whom the allegations in this pleading are asserted.

Robin M. Wolpert
Robin M. Wolpert