

SC 85053

IN THE SUPREME COURT OF MISSOURI

KATHERINE LOUISE HELSEL,
Respondent.

v.

SIVI NOELLSCH, D.C.,
Appellant.

BRIEF OF THE RESPONDENT

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Abbreviations used are:

L.F. Legal File

Tr. Transcript

R.A. Respondent's Appendix

Jurisdictional Statement

This is an appeal from a judgment for damages entered upon a jury verdict in the Circuit Court of Buchanan County, Missouri, for alienation of affections.

This case was transferred to this Court by its own order pursuant to Rule 83.01.

The Supreme Court of Missouri has jurisdiction over this case in its capacity as “the highest court in the state,” Article V, Section 2, Constitution of Missouri, and the Court’s power to establish rules of procedure, Article V, Section 5.

Statement of Facts

Katherine Rieken met David Helsel in 1993 (Transcript 224). They became engaged on Christmas Eve in 1995 and were married in 1996 (Tr. 225). They had a large wedding with family and friends (Tr. 225). Their first child was born in 1997 (Tr. 334).

According to David Helsel, after the birth of their first child in 1997, Katherine Helsel refused to have sex with David for a number of months (Tr. 338-339). In April of 1999, they discussed divorce during a heated conversation (Tr. 229, 340). After that argument, the idea of having a second child was discussed (Tr. 340). According to David, he informed Katherine that he was strongly opposed to having any further children (Tr. 340). David testified that he continued to emphasize to Katherine his very firm position that he wanted no additional children (Tr. 344, 348, 439-441).

Katherine Helsel testified that some time following the argument in April, she and David began to talk about and make plans to have a second child (Tr. 230-231). She testified that David's only expressed concerns about having a second child were financial (Tr. 231). Katherine Helsel stopped taking birth control pills in April of 1999 (Tr. 232). Katherine testified that she and David used condoms after that time to ensure that the birth control pill was out of her system before they tried to conceive a child (Tr. 233). According to Katherine, in July or August of 1999 they stopped using condoms and continued to have sexual intercourse one to two times a week (Tr. 234). In the latter part of August they conceived their second child (Tr. 235, 344, 348). Katherine informed David that she was pregnant when he returned from a hunting trip. According to

Katherine, when David learned that she was pregnant he was smiling and appeared excited (Tr. 237). That evening they had sexual intercourse (Tr. 237).

David stated that he had decided while on that hunting trip that he would divorce Katherine (Tr. 349). David testified that he had not planned on having the second child, and he felt that Katherine had tricked him into the pregnancy (Tr. 178, 348-354,439-442).

David testified that he made his decision to divorce Katherine in September of 1999, but he felt he couldn't file legally while Katherine was pregnant (Tr. 168,353). David stated that he decided to wait until after the baby was born to file for divorce (Tr. 167). David testified that he had stopped loving Katherine long before September of 1999 (Tr. 168). David subsequently testified that as the holidays approached at the end of 1999, he wanted his marriage to Katherine to work (Tr. 354). He testified that he and Katherine were still having sex throughout the holidays in 1999 (Tr. 357).

David testified that in October of 1999 a woman named Danielle showed a romantic interest in him (Tr. 186-187). She was a blonde and busty hairdresser who David found attractive (Tr. 187). She began calling him and flirting with him (Tr. 187). David testified that he told Danielle he was married, his wife was pregnant, and “it wasn’t going to happen between the two of them” (Tr. 187).

Dana Poese was David Helsel’s office manager (Tr. 199). According to Mrs. Poese, at a Christmas party in early to mid-December of 1999, Katherine and David appeared to be happy and there appeared to be no animosity between them (Tr. 120-121). At that party, David and Katherine ate and danced together (Tr. 220).

Katherine Helsel testified that she believed that significant difficulties in her marriage with David began sometime in December, 1999 (Tr. 229). She had no evidence to support her belief other than David was gone with his friends for some periods of time and he made comments about her body weight and appearance (Tr. 246).

In April, 2000, David told Katherine that he wanted a divorce (Tr. 355, 356). Despite Katherine's requests, David insisted that he did not want to go to marriage counseling (Tr. 24). David told Katherine that the marriage was over (Tr. 250). David testified that he told Katherine in April "you need to sign that school contract [for next year] because I'm leaving when the baby's here" (Tr. 168).

On May 12, 2000, their second child was born (Tr. 101, 253). Shortly thereafter, on May 25, 2000, David filed for divorce in Clinton County, Missouri (Tr. 95, 270, 357).

In late May of 2000, Katherine was home following her C-section and David was home following his vasectomy (Tr. 265). Their conversations during this time period gave Katherine hope that her marriage could be saved (Tr. 266-268). Katherine testified that she would feel like they were making headway, and then the next day David would again be negative (Tr. 267). Katherine testified that she and her husband had intercourse six weeks after the birth of their second child, in June or July of 2000 (Tr. 319). At that time, David Helsel was still giving Katherine hope that her marriage could be saved (Tr. 265-269).

In November, 1998, Dr. Mary Huss, a chiropractor, treated David Helsel for his neck problems (Tr. 158, 159). Thereafter, Dr. Huss' associate, Dr. Sivi Noellsch, provided David Helsel with further care and treatment when Dr. Huss was no longer

available (Tr. 158, 159). Dr. Noellsch treated David Helsel during 1999 (Tr. 163-164). She treated Katherine Helsel as well (Tr. 344, 348).

David Helsel testified that he first told Sivi Noellsch that he and his wife were having problems in March of 2000 (Tr. 184). According to Sivi, David did not tell her that he was contemplating divorce until June of 2000 (Tr. 74). In June 2000, David says he expressed to Sivi for the first time his interest in being more than just a friend (Tr. 162, 461-462, 479). Sivi testified that she at first refused to date him because he was her patient (Tr. 462). She stated that she encouraged him to get counseling (Tr. 461). Sivi testified that because David had separated from his wife, he had filed for divorce, and he had decided to no longer be her patient, she eventually reconsidered and began dating him (Tr. 162,462). Sivi believed that once David and Katherine were separated and no longer committed to one another, David was free to have new social relationships (Tr. 462).

Sivi testified that she went out socially with David for the first time in the second or third week in June, 2000 (Tr. 70, 459, 461). Sivi Noellsch admitted that in early July of 2000 she was in a sexual relationship with David Helsel (Tr. 68). Sivi and David spent the night at the Radisson Hotel in Kansas City over the July 4th weekend of 2000 (Tr. 73). In September of 2000, David and Sivi took a trip to St. Louis (Tr. 73). In October they took a trip to Branson (Tr. 73).

Sivi Noellsch testified that she was fired from her job at Advanced Chiropractic in May of 2001 (Tr. 64, 489). Part of her contract provided that she could not date patients (Tr. 64). Admittedly, Sivi Noellsch violated that provision of her contract, and that was

at least one of the stated reasons why she was fired (Tr. 64, 489). Because of the non-compete clause in her contract, Sivi was prohibited from practicing within thirty miles of St. Joseph (Tr. 489). Sivi breached this agreement and paid liquidated damages of \$50,000 to her former employer (Tr. 490).

Sivi stated she did not, in any manner, pursue David or encourage him to leave Katherine (Tr. 471). David stated that it was he who pursued Sivi. (Tr. 118).

Mrs. Poese, David's office manager, testified that in December of 1999 David received a watch, silk boxers, a shirt, and a couple of other gifts from Sivi Noellsch (Tr. 127). She also stated that David received flowers at his office two times prior to June of 2000 from Sivi (Tr. 128). In January of 2000 David went to Sivi's office to show her a deer that he had killed (Tr. 75). David and Sivi began working out at a gym together in February of 2000 (Tr. 72). On two occasions in March of 2000, Sivi took David as her guest to the gym (Tr. 107). In February or March of 2000, David brought Sivi into his office, where she met Ms. Poese for the first time (Tr. 122). According to Mrs. Poese, Sivi came into David's office in a shirt with her cleavage showing (Tr. 124). For a few weeks prior to that time, Mrs. Poese stated that Sivi had been calling David at the office (Tr. 123). She believed that this contact by a woman other than his wife was not normal or regular (Tr. 124). She expressed her uncomfortable feelings to David (Tr. 124). Prior to June of 2000, David also received cards and letters at his office, on which Mrs. Poese observed Sivi's signature (Tr. 128). Mrs. Poese stated that David seemed flattered by the gifts (Tr. 133).

David testified that until the day before his testimony in court (the day Dana Poese testified) that he thought that he had ended his business relationship with Mrs. Poese amicably (Tr. 190). After Mrs. Poese's courtroom testimony, David then testified that Mrs. Poese had flirted with him during his marriage (Tr. 189). David admitted, however, that in his deposition of August 28, 2000, he had stated that no one other than Danielle had shown an interest or flirted with him during his marriage to Katherine (Tr. 189). David also admitted that in his deposition he had stated that he ended his business relationship with Mrs. Poese on a positive note (Tr. 190). Sivi later testified that Mrs. Poese was jealous of her and disgruntled (Tr. 479).

Sivi Noellsch's cell phone records beginning on March 30, 2000, were admitted into evidence (Tr. 97-98, RX 7). According to Sivi, David gave her his cell phone number in February of 2000 (Tr. 90). A cell phone was placed in Sivi's name at the end of March of 2000 (Tr. 91). Prior to that time, her cell phone records had been in her former husband's name (Tr. 91). Sivi testified that during the months of March, April, and May, 2000, she was involved in a legal dispute arising from a non-compete agreement with her former employer, Dr. Huss (Tr. 78-79). Sivi stated that she consulted with David, who had prior experience with a non-compete agreement, and sought his business advice on how to cope with this during repeated telephone business conferences during February, March, April, and May of 2000 (Tr. 78-80, 105).

Sivi Noellsch's cell phone records demonstrated that by the end of March of 2000, Sivi was calling David Helsel as many as eight times a day (R.A. A5). Sivi testified that she called David on his cell phone six times the day his second daughter was born (Tr.

101, R.A. A24). She also called him at 1:36 a.m. the following morning (Tr. 103, R.A. A24). Sivi called David four times on the day he first filed for divorce from Katherine (Tr. 96, R.A. A27). Sivi admitted that by this time in May of 2000, she was calling David probably ten times a day (Tr. 99). She would call David at all times of the day and night (Tr. 91, R.A. A5-A29). Between March 30, 2000, and May 30, 2000, Sivi placed 270 cell phone calls to David either at his office or on his cell phone. (R.A. A5-A29). There was only one day during that time period, April 27, 2000, that Sivi did not place at least one call to David Helsel (R.A. A5-A29). Despite all the calls Sivi was making to David, she did not place a single call to the home where he lived with Katherine (Tr. 92).

Up until the end of June or early July of 2000, Katherine Helsel still believed that her marriage could be saved (Tr. 254). That was the time when she learned of David's relationship with Sivi (Tr. 254).

In July of 2000, Katherine confronted Sivi at the gym (Tr. 86). Katherine told Sivi that she loved her husband and her family and asked Sivi to quit working out with him (Tr. 87, 466). Sivi repeatedly responded that she had nothing to say to her and that Katherine needed to talk to her husband (Tr. 88, 467). Sivi did not quit working out with David and continued sleeping with him, despite Katherine's pleas (Tr. 88). Shortly after that time, David admitted to his wife for the first time that he had developed a physical as well as social relationship with Sivi (Tr. 293, 295).

Appellant subpoenaed and called Don Christensen to testify during the trial (Tr. 397). Katherine Helsel had been a client of Mr. Christensen, who was a clinical social worker, during her divorce from David Helsel (Tr. 397-398). Mr. Christensen testified

that Katherine had presented to his office as an upset, sad, and hurt individual (Tr. 408). He diagnosed Katherine with adjustment disorder with anxiety and depression (Tr. 411). He recalled Katherine's indication that David had some financial concerns about conceiving a second child, but she never expressed that she had tricked David into a second pregnancy (Tr. 412, 418). Instead, the guilt Katherine revealed to Mr. Christensen was related to her sense that she had failed in her relationship and let people down (Tr. 412). In her sessions with Mr. Christensen, Katherine indicated that even after she had counter-filed for divorce, divorce was not what she wanted (Tr. 416).

On June 27, 2000, David re-filed for divorce, this time in Buchanan County (Tr. 254). In January 2001, the judgment for the dissolution of the marriage was entered (L.F. 2, Tr. 68, 325). On March 22, 2001, David filed his Motion to Modify the dissolution judgment. On March 27, 2001, Katherine filed her Alienation of Affections lawsuit against Dr. Noellsch (L.F. 1, Tr. 314). Katherine testified that she had been thinking about filing her petition for alienation of affections against Sivi since the time of the divorce (Tr. 314). She was not served with David's Motion to Modify the dissolution judgment until April 2, 2001, about a week after she filed her Petition (Tr. 324).

Sivi Noellsch and David Helsel were married in February of 2002 (Tr. 471). She is now Sivi Noellsch Helsel.

Katherine Helsel's lawsuit against the wife of her former husband was tried before a jury in the Circuit Court of Buchanan County, Judge Randall R. Jackson presiding (L.F. 8-10). At the close of all the evidence, Dr. Noellsch moved for a directed verdict, which was denied (Tr. 330). The jury returned a verdict for the plaintiff and awarded her actual

damages of \$50,000.00 and punitive damages of \$25,000.00 (L.F. 9). The Court entered judgment upon the jury's verdict for the plaintiff (L.F. 26). Dr. Noellsch filed her motion for judgment notwithstanding the verdict and alternatively for a new trial or remittitur (L.F. 26). Dr. Noellsch asked the trial court to abolish the tort of alienation of affections in Missouri, and the trial court declined to do so (Tr. 561, L.F. 14, 18). The Court then denied the post-trial motions (Tr. 561, L.F. 14, 18). Dr. Noellsch timely filed her notice of appeal (L.F. 19).

Points Relied On

- I. The trial court did not err in not abolishing the tort of alienation of affections because this tort provides an avenue for a plaintiff spouse to recover for injuries suffered when a defendant interferes in a marital relationship and the rationale for this tort continues to exist in that (1) this cause of action provides an economic incentive designed to help preserve the sanctity of the marriage relationship and protects the love, society, companionship, and comfort that form the foundation of a marriage; (2) there is no alternative legal recourse to compensate a plaintiff spouse for the intentional actions of a third party who wrongfully interferes in a marital relationship; and (3) there is no other legal recourse to discourage a third party from wrongfully interfering with a marital relationship.

Thomas v. Siddiqui, 869 S.W. 2d 740 (Mo. 1994)

Norton v. Macfarlane, 818 P.2d 8 (Utah 1991)

Hunt v. Hunt, 390 N.W.2d 818 (S.D. 1981)

Bland v. Hill, 735 So.2d 414 (Miss. 1999)

II. The trial court did not err in not directing a verdict in favor of the appellant at the close of evidence or not granting judgment n.o.v. because the respondent proved a submissible case of alienation of affections, in that appellant pursued a course of conduct that had the natural and probable consequence of alienating the affections of respondent's spouse including repeated phone calls, sending cards, flowers and gifts, meeting respondent's husband at the gym, and ultimately engaging in an adulterous relationship with him.

Van Vooren v. Schwarz, 899 S.W.2d 594 (Mo.App.E.D.1995)

Sanders v. Wallace, 817 S.W.2d 511 (Mo.App.E.D. 1991)

Muchisky v. Kornegay, 741 S.W.2d 43 (Mo.App.E.D. 1987)

Comte v. Blessing, 381 S.W.2d 780 (Mo. 1964)

Argument

I. The trial court did not err in not abolishing the tort of alienation of affections because this tort provides an avenue for a plaintiff spouse to recover for injuries suffered when a defendant interferes in a marital relationship and the rationale for this tort continues to exist in that (1) this cause of action provides an economic incentive designed to help preserve the sanctity of the marriage relationship and protects the love, society, companionship, and comfort that form the foundation of a marriage; (2) there is no alternative legal recourse to compensate a plaintiff spouse for the intentional actions of a third party who wrongfully interferes in a marital relationship; and (3) there is no other legal recourse to discourage a third party from wrongfully interfering with a marital relationship.

Standard of Review

This Court is presented with the question of whether or not to abolish the tort of alienation of affections. This Court has the authority to abolish common law torts. *Thomas v. Siddiqui*, 869 S.W.2d 740 (Mo.banc 1994). This Court has the authority to alter or abrogate a common law doctrine absent contrary statutory direction by the legislature. *Townsend v. Townsend*, 708 S.W.2d 646, 650 (Mo.banc 1986). A question of law is reviewed de novo. *Ochoa v. Ochoa*, 71 S.W.3d 593,595 (Mo.banc 2002). The decision whether or not to abolish a tort is a question of law. *Townsend*, 708 S.W.2d at 650.

This Court should continue to recognize the tort of alienation of affections in Missouri because this cause of action serves a number of legitimate purposes. It protects the marital relationship. It also allows an injured plaintiff to recover from a third party who intentionally engages in wrongful actions. Additionally, it deters third persons from interfering in the marital relationship.

Since 1935, legislatures and, less frequently, courts have discarded the tort theory of alienation of affections. Professor William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 Ariz. St. L.J. 985 (2001). Only six states have abolished alienation of affections by judicial decision. *Thomas v. Siddiqui*, 869 S.W.2d 740, 744 n3 (Mo.banc 1994) (Robertson, J., dissenting). These states include Idaho, Iowa, Kentucky, South Carolina, Tennessee and Washington. *O'Neil v. Schuckardt*, 733 P.2d 693 (Idaho 1986); *Fundermann v. Mickelson*, 304 N.W.2d 790 (Iowa 1981); *Hoye v. Hoye*, 824 S.W.2d 422 (Ky. 1992); *Russo v. Sutton*, 422 S.E.2d 750 (S.C. 1992); *Dupis v. Hand*, 814 S.W.2d 340 (Tenn. 1991); *Wyman v. Wallace*, 615 P.2d 452 (Wash. 1980). As Judge Robertson, who opposed judicial intervention in this area, noted in *Thomas*, “[t]his record hardly seems a national groundswell for judicial intervention in this area.” *Thomas*, 869 S.W.2d at 744. All of the other thirty-three states that have abolished alienation of affections have done so by legislative act. *Id.* at 744. In fact, no state has abolished this cause of action in the last ten years, and many have recently affirmed it as a viable theory of recovery.

Nine states still recognize alienation of affections as a valid cause of action. Those states include Hawaii, Illinois, Missouri, Mississippi, New Hampshire, New Mexico, North Carolina, South Dakota and Utah. *Veeder v. Kennedy*, 589 N.W.2d 610, 614, 622 (S.D. 1999). In recent years, the question of whether or not to abolish the tort has been presented in several of these states. See *Hunt v. Hunt*, 390 N.W.2d 818 (S.D. 1981); *Veeder v. Kennedy*, 589 N.W.2d 610 (S.D. 1999); *Saunders v. Alford*, 607 So.2d 1214 (Miss. 1992); *Bland v. Hill*, 735 So.2d 414 (Miss. 1999); *Norton v. Macfarlane*, 818 P.2d 8 (Utah 1991); *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983).

Since the decision in *Thomas*, the opportunity to abolish the tort of alienation of affections has been presented to the Eastern District Court of Appeals on two occasions in *Van Vooren v. Schwarz* and *Hellman v. Walsh*. *Van Vooren v. Schwarz*, 899 S.W.2d 594 (Mo.App.E.D. 1995); *Hellman v. Walsh*, 965 S.W.2d 198 (Mo.App.E.D. 1998). In both cases, the Court noted, “that the tort of alienation of affections remains as an avenue for a spouse to recover for injury.” *Van Vooren*, 899 S.W.2d at 595, *Hellman*, 965 S.W.2d at 199.

The appellant in this case suggests several reasons why the cause of action for alienation of affections in Missouri should be abolished. All of these arguments, and others, have been addressed in recent years by courts choosing to uphold the cause of action for alienation of affections, and have been found to be unpersuasive. A summary of these arguments follows.

A. Alienation of affections is not an archaic or outdated tort that treats married women as property because its modern content bears little resemblance to that notion.

Appellant argues that the tort of alienation of affections is premised on the antiquated Anglo-Saxon property law concept that the spouse and the spousal affections are chattel that can be stolen by a third party and it should therefore be abolished. The abolition of the original basis for the action does not necessarily prove that it has not still justification under modern conditions. Corbett, *supra* at 1015. Alienation of affections is still desirable for its effect of “discouraging the intentional breaking up of homes.” *Id.*

The Supreme Court of Utah upheld the cause of action for alienation of affections in *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983). The defendant in that case argued that a cause of action for alienation of affections was based on the obsolete and fictitious assumption that the wife is one of the husband’s chattels and that her companionship, services and affections are his property. *Nelson*, 669 P.2d at 1215. “While the archaic notion of ‘wife as chattel’ may have served as the historical foundation for this cause of action, its modern content bears little resemblance to that notion.” *Nelson* at 1215. “Moreover, an action for alienation of affections is no longer based on the premise that either spouse constitutes the “property” of the other, but on the premise that each spouse has a valuable interest in the marriage relationship, including its intimacy, companionship, support, duties, and affection.” *Id.* at 1215.

The Utah Supreme Court again upheld the cause of action for alienation of affections in *Norton v. Macfarlane*, 818 P.2d 8 (Utah 1991). The court addressed the

argument that the tort of alienation of affections was an historical anomaly. *Norton*, 818 P.2d at 12. The Court found that argument to be incorrect. *Id.* at 12. The court stated, “[f]ew today would challenge the proposition that a sound marriage relationship is intrinsically deserving of protection from outside assaults made by those who use improper means to interfere with it.” *Id.* “The obsolete procedural and property theories that once attended the tort, and are relied on by the dissenters as reasons for abolishing the tort, have long been abandoned; if applied today, they would be unconstitutional.” *Id.*

In *Bland v. Hill*, 735 So.2d 414, 421 (Miss. 1999), the Mississippi Supreme Court declined the invitation to abolish the tort of alienation of affections. The dissent in that case argued that the tort of alienation of affections was based on an archaic view that a wife was the property of her husband. *Bland*, 735 So.2d 414, 426 (McRae, J., concurring in part and dissenting in part). In an opinion concurring with the majority, Justice Smith pointed out that “recent times have seen the tort of alienation of affection made applicable to women and rightly so.” *Bland*, 735 So.2d at 421 (Smith, J., specially concurring). “Now that the sexes have at least for these purposes been equaled, it is quite ironic for the dissent to state that the tort is based on archaic notions of the wife as property of the husband. To the contrary, there is no point in abolishing an otherwise valid common law tort, especially now that we have leveled the playing field.” *Id.* at 421. “The traditional family is under such attack both locally and nationally these days that this Court should not retreat now from the sound view of the tort of alienation of affections. . .” 735 So.2d at 422. Justice Smith likened the argument that the tort no longer serves a legitimate purpose in modern society to the view “everybody else is doing

it, so should I.” *Id.* While agreeing that it appears that society’s moral values have changed during modern times, Justice Smith did not believe that Mississippi “should get aboard this runaway train.” *Id.*

B. The abolishment of the tort of criminal conversation does not require that the tort of alienation of affections be abolished.

The appellant argues that there is no good reason for distinguishing criminal conversation, enticement and alienation of affections and that the Court should apply its logic in *Thomas v. Siddiqui*, 869 S.W.2d 740 (Mo.banc 1994), to abolish alienation of affections in Missouri.

In *Thomas*, the Court considered the possible reasons criminal conversation should be recognized as a valid tort. *Thomas*, 869 S.W.2d at 741-742. In *Thomas*, the respondent argued that criminal conversation was a statutorily approved cause of action. *Id.* at 741. The Court disagreed, citing *Bogart v. Jack*, 727 S.W.2d 447 (Mo. App. 1987), “[c]riminal conversation has always been a common law tort in Missouri.” 869 S.W.2d at 741. The Court also addressed whether the tort of criminal conversation was necessary to punish adultery. 869 S.W.2d at 742. The Court noted that the decriminalization of the act of adultery was noted as evidence of society’s intent to no longer punish adultery as a crime. *Id.* at 742. In response to the respondent’s contention that abolishing the tort of criminal conversation would encourage adultery, the Court stated that there are other disincentives that serve this purpose. *Id.*

The Court noted that another possible reason for the tort of criminal conversation was to compensate a plaintiff for injuries caused by an adulterous defendant.” *Thomas*, 869 S.W.2d at 741. The Court found that two avenues still existed to compensate the plaintiff spouse. *Id.* at 741. The first avenue existing to compensate the plaintiff spouse is that conduct during the marriage, including adultery, is a factor that the court considers in dividing marital property in dissolution. 869 S.W.2d at 741. The other avenue remaining to compensate the plaintiff spouse after the abolition of the tort of criminal conversation was through an action for alienation of affections, which is governed by a different set of legal rules than an action for criminal conversation. *Id.* at 741. In other words, the *legal premise for abolishing criminal conversation was based in part on the continued validity of a cause of action for alienation of affections.*

In the case of *Hunt v. Hunt*, 390 N.W.2d 818 (S.D. 1981), the South Dakota Supreme Court abolished the tort of criminal conversation. The majority in that case declined, however, to abolish the tort of alienation of affections, although that issue was also presented to them. *Hunt*, 390 N.W.2d at 819. The Court stated that by upholding the validity of the tort of alienation of affections, “we are not completely abolishing the effect of adulterous conduct upon a marriage when we abrogate the action for criminal conversation.” *Hunt* at 823. The Court further stated that it was one thing to abolish a tort devoid of defenses and unjust, but it is quite another to abolish a long-standing legislative and judicial intention to preserve the sanctity of marriage by providing a civil remedy where reasonable and just defenses are available to a defendant. *Id.* at 823.

Finally the court stated:

“...because we happen to be living in a period of loose morals and frequent extra-marital involvements is no reason for a court to put its stamp of approval on this conduct; and I feel certain that a case will arise in the future where some party has so flagrantly broken up a stable marriage that we would rue the day that an alienation suit was not available to the injured party.”

Id. at 823.

In 1999, the Supreme Court of South Dakota was again presented with the issue of whether public policy required that they reexamine and abolish the tort of alienation of affections. *Veeder v. Kennedy*, 589 N.W.2d 610 (S.D. 1999). The Court in *Veeder* declined to abolish the tort of alienation of affections, concurring with the decision in *Hunt* that the court was not the proper forum for resolving the issue. *Veeder* at 616.

In 1992, the Supreme Court of Mississippi abolished the tort of criminal conversation. *Saunders v. Alford*, 607 So.2d 1214 (Miss. 1992). The Court cited various reasons for the abolishment of the tort, including that the tort of alienation of affections was better suited than criminal conversation as a deterrent protecting the marital relationship. *Saunders*, 607 So.2d at 1218. “The purpose of a cause of action for alienation of affection is the ‘protection of the love, society, companionship, and comfort that form the foundation of a marriage . . .’” *Saunders*, 607 So.2d at 1215 (quoting *Norton v. MacFarlane*, 818 P.2d 8, 12 (Utah 1991)).

The Supreme Court of Mississippi cited the above language in 1999 when the question of whether or not Mississippi should abolish the tort of alienation of affections

was again presented to the Court. *Bland v. Hill*, 735 So.2d 414 (Miss. 1999). The Court stated, “where a husband is wrongfully deprived of his rights to the ‘services and companionship and consortium of his wife,’ he has a cause of action ‘against the one who had interfered with his domestic relations.’... The husband might then sue for ... alienation of affection....” *Bland*, 735 So.2d at 418 (quoting *Camp v. Roberts*, 462 So.2d 726, 727 (Miss. 1985). A spouse “is entitled to society, companionship, love, affection, aid, services, support, sexual relations and the comfort of her husband [his wife] as special rights and duties growing out of the marriage covenant.” *Bland* at 418. “To these may be added the right to live together in the same house, to eat at the same table, and to participate together in the activities, duties and responsibilities necessary to make a home.” *Id.* at 418. “The loss of consortium is the loss of any or all of these rights.” *Id.* “We believe that the marital relationship is an important element in the foundation of our society. To abolish the tort of alienation of affections would, in essence, send the message that we are devaluing the marriage relationship.” *Bland* at 418. The Court, therefore, declined to abolish the tort of alienation of affections. *Id.* at 418.

Further, Justice Smith indicated that he did not want to take away “an offended spouse’s *only* legal means to seek redress in our courts for the wrongful conduct of a third party who willfully and intentionally interferes in and aids in destroying a marriage.” *Id.* (*emphasis added*). On the argument that the Court’s abolition of the tort of criminal conversation was a basis for abolishing alienation of affections, Justice Smith cited Missouri’s continued recognition of the viability of the tort of alienation of affections in *Thomas v. Siddiqui*. *Id.*

In *Norton v. Macfarlane*, 818 P.2d 8 (Utah 1991), the Utah Supreme Court also addressed the question of whether the tort of criminal conversation should be abolished. *Norton* at 16. Because the Court found that it was both unfair and bad policy to allow a non-offending spouse who has not been damaged to recover damages for the adultery of the other spouse and a third person when that act does not affect the marital interest, the Court determined that the tort of criminal conversation served no useful purpose. *Norton* at 16-17. “Because the law provides an adequate remedy when the marital bonds and relational interests are damaged by illicit sexual intercourse, we hold that the tort of criminal conversation is unnecessary and should be abolished as a tort separate and apart from the overlapping tort of alienation of affections.” *Norton* at 17.

Academia also recognizes that the tort theories of criminal conversation and alienation of affections are separate theories with distinct elements and distinguishable historical pedigrees. *See Corbett, supra* at 991.

C. Alternative theories of recovery are not available.

Appellant in this case also argues another remedy exists to compensate the plaintiff spouse in that adultery is a factor the court considers in dividing marital property after dissolution.

As a general rule, the division of marital property should be substantially equal unless one or more statutory or relevant non-statutory factors cause such a division to be unjust. *Ballard v. Ballard*, 77 S.W.3d 112, 116 (Mo.App.W.D. 2002). Misconduct by a spouse cannot be used to punish that spouse by awarding a disproportionate share of the

marital estate to the other spouse. *Ballard*, 77 S.W.3d at 117. It is only when misconduct of one spouse changes the balance so that the other must assume a greater share of the partnership load that it is appropriate that such misconduct affect the distribution of property. *Messer v. Messer*, 41 S.W.3d 640, 643 (Mo.App.S.D. 2001). Even if the trial court believes the evidence of misconduct, it may still divide the marital property in substantially equal fashion if proper to do so under all factors set forth in section 452.330.1, R.S.Mo. 41 S.W.3d at 643. Even though extramarital affairs have been held to justify a disproportionate division of marital property, evidence of an extramarital affair, by itself, is insufficient to justify a disproportionate division. *Ballard*, 77 S.W.3d at 118. The non-offending spouse must provide evidence of specific added burdens that he or she suffered as a result of such misconduct. *Id.* at 118. Although a court can consider marital misconduct in dividing property in a dissolution of marriage, the court cannot use this means to punish the offending spouse and without proof of an added burden on the non-offending spouse, the adultery will go unpunished.

Furthermore, there are certain situations when a non-offending spouse would not be adequately compensated through an action for dissolution of marriage. One instance would be when there is little property to be divided between the spouses. Another instance would be when a spouse does not learn of the extramarital affair until after a dissolution of marriage. In this instance, an action for alienation of affections would be the wronged spouse's only legal recourse.

In the case of *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 652 - 653 (Mo.banc 1986), the respondent argued that dissolution of marriage proceedings between the parties affords appellant an adequate avenue of redress for interspousal torts.

“While there are distinct differences between the division of marital property between spouses and awards of damages for an injury, to the extent that conduct of the spouses is taken into account in division of marital property pursuant to § 452.330.1(4), R.S.Mo Supp. 1984, the dissolution decree might be admissible in the subsequent tort action subject to usual constraints of relevance, competence and with a careful eye to questions of causation and speculativeness of damages. The same may hold true for the dissolution proceeding if that action follows trial of the tort claim.”

708 S.W.2d at 653. This same logic can be applied to the tort of alienation of affections.

D. Alienation of affections suits are useful as a means of preserving families.

“One primary purpose of legal systems is to modify human behavior, to induce at least some people to act in ways that they would not choose but for the pressure of legal incentives or disincentives.” *Thomas v. Siddiqui*, 869 S.W.2d 740, 743 (Mo.banc 1994) (Robertson, J., dissenting) (citations omitted). “[A]lienation of affection actions provide some economic incentive designed to channel human behavior toward preserving the sanctity of marriage.” *Id.* at 743. “[T]he policy of Missouri’s laws says unequivocally that the marriage contract is of a special status, far more important and worthy of

protection than a contract for the sale of widgets or for the acquisition of a business opportunity.” *Id.* “[Yet], if alienation of affections does not survive as a cause of action ultimately, Missouri will continue to recognize a common law tort for the intentional interference with economically driven contractual relationships, while abolishing a cause of action for interference with a relationship the success of which is a major determinant of the strength of our social fabric.” *Thomas* at 744.

Because financial liability is placed on an outsider in an action for alienation of affections, the deterrent effect is achieved by making the outsider less interested in the married person. *Corbett, supra* at 1017. “Given that the outsider is likely to have other options that do not carry all the risks associated with the married person, the additional risk of financial liability may deter the outsider.” *Id.* As an example, interference with contractual relations in the context of employment contracts is another relational tort. *Id.* The objective of that tort is not to prevent the employees from breaching their contracts, but instead to deter third parties from interfering by decreasing the value to the prospective employer of the employee under contract. *Id.*

“[T]he tort of alienation of affections protects the marriage relationship from a variety of assaults by third persons, whether extramarital sexual affairs are involved or not.” *Norton v. Macfarlane*, 818 P.2d 8, 12 (Utah 1991). “The gist of the tort is the protection of the love, society, companionship, and comfort that form the foundation of a marriage and give rise to the unique bonding that occurs in a successful marriage.” *Id.* at 12. “A fact that is often ignored in arguments favoring abolition of the tort is that the tort

lies for all improper intrusions or assaults on the marriage relationship, whether or not they are associated with extramarital sex.” *Norton* at 13.

The Utah Court noted that the American Law Institute retained the tort of alienation of affections in the Restatement (Second) of Torts Section 683 (1977). *Norton* at 13. Section 683 of the Restatement (Second) of Torts provides “[o]ne who purposely alienates one spouse’s affections from the other spouse is subject to liability for the harm thus caused to any of the other spouse’s legally protected marital interests.”

Dean Prosser agreed at that time that the tort should be retained: “[Statutes which abolish alienation of affections] reverse abruptly the entire tendency of the law to give increased protection to family interests and the sanctity of the home, and undoubtedly they deny relief in many cases of serious and genuine wrong.” *Norton* at 13 (quoting W. Prosser, *Handbook of The Law of Torts* § 124, at 887-88 (4th ed. 1971)). The Court stated that although that statement did not occur in the fifth edition of Dean Prosser’s *Handbook of The Law of Torts*, it is no less true today. *Norton* at 13.

The tort of alienation of affections is based on the presumption that marriages are delicate relationships, which often teeter in the balance. *Corbett, supra* at 1019. Spouses often have to deal with matters that are not always fun including balancing budgets and caring for children. *Id.* “A third person, who offers the fun and excitement of sexual relations unencumbered by these other weighty matters, might be an attractive diversion, or more.” *Id.* “In a society that purports to value relationships, particularly marriages and family relationships, and a tort law regime that has recognized expansive and

expanding duties to avoid injuring other, I think a duty should be recognized not to interfere in an existing marriage.” *Id.*

E. There is Little Potential for Abuse and Extortion.

It is often argued that this tort is particularly susceptible to the abuse of extortion and blackmail. Corbett, *supra* at 1012. This same argument was advanced as a reason not to abolish the interspousal immunity doctrine. *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 652 - 653 (Mo.banc 1986). “Long established common law principles authorize courts to compel tort-feasors to compensate those they intentionally or negligently injure.” *Townsend v. Townsend*, 708 S.W.2d 646 (Mo.banc 1986).

The courts must provide a forum to redress legitimate and compensable injuries. *S.A.V.*, 708 S.W.2d at 652. “It cannot be said it is beyond the capacity of our courts to examine and on a case-by-case basis define or adjust the duty of care required between married persons to accommodate the "give-and-take" of married life.” *S.A.V.* at 652.

The Supreme Court of Utah in *Norton* addressed the argument that the tort of alienation of affections should be abolished because it was “predicated largely on allegations of abuse of the tort by collusion of spouses against third parties for purposes of blackmail and the assertion that abuses are so prevalent that the tort should be abolished.” 818 P.2d at 12. The Court observed that several legislatures abolished the tort in the 1920s and 1930s on similar grounds, but recognized that public attitudes that created the potential for abuse have changes considerably. *Id.* at 12. Victorian attitudes of the time created the possibility that an allegation of sexual misconduct could

potentially ruin a person. *Id.* A threat of charging another with sexual misconduct was indeed a basis for blackmail. *Id.* The Court found that the basis for abuse has diminished as the Victorian attitudes toward sex have diminished and yielded to a much more frank and open attitude toward sex. *Id.*

In a prior case, the Supreme Court of Utah upheld the cause of action for alienation of affections. *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983). The Court in *Nelson* also addressed the allegation that the threat of an action for alienation of affections is a powerful tool of extortion. *Nelson* at 1216. An action for alienation of affections is no more extortive in this sense than a suit to change the custody of children on the basis of the parental deficiencies of a custodian. *Nelson* at 1216. “If, as defendant claims, it is “[g]reed, revenge, spite and a desire to humiliate other” that encourages a plaintiff to sue for alienation of affections, the plaintiff must surely be dissuaded to some extent by the knowledge that his or her own foibles, failures, and inadequacies as a marital partner may be given public exposure by a defendant seeking to disprove causation or to mitigate damages.” *Nelson* at 1216. “In any case, even if some alienation actions are motivated primarily by spite or extortion, that is no basis on which to abolish the cause of action altogether.” *Id.* at 1216. The Court in *Nelson* stated:

“[T]he very purpose of courts is to separate the just from the unjust causes; second, if the courts are to be closed against actions for . . . alienation of affections on the ground that some suits may be brought in bad faith, the same reason would close the door against litigants in all kinds of suits, for in every kind of litigation some suits are brought in bad faith; the very

purpose of courts is to defeat unjust prosecutions and to secure the rights of parties in just prosecutions. . . .”

Nelson at 1216. The Court researched this issue of possible extortion in alienation of affections actions and noted, “our research has disclosed only one case in which there was evidence that the plaintiff and the “alienated” spouse colluded for purposes of extortion, and in that case recovery was denied” *Nelson* at 1216. “[A]bolishing a cause of action for alienation of affections will not eliminate or even reduce extortion (which can still be accomplished by threatening to expose a person to his family or colleagues or publicize his indiscretions in other ways), but it will surely close the courthouse doors to at least some deserving plaintiffs.” *Nelson* at 1216.

The Court went on to address the concern that the cause of action for alienation of affections can be used to victimize an innocent or unsuspecting defendant. *Nelson* at 1216-1217. Alienation of affections is an intentional tort and therefore “[t]here can be no recovery against a defendant whose conduct is blameless or merely negligent (such as a person who is not aware that the object of his or her attentions is married.)” *Nelson* at 1217. “In fact, where a defendant has actual notice of the marriage, his or her continued overtures or sexual liaisons can be construed as something akin to assumption of the risk that this conduct will injure the marriage and give rise to an action.” *Nelson* at 1217.

F. Causation and damages are not difficult to prove.

Another argument sometimes used to suggest that the tort should be abolished is the problem of an absence of an objective basis for determining the proper amount of

damages for the emotional nonobjective aspects of consortium. The Court in *Norton* found that this was not a valid reason for refusing to extend judicial protection to the marital bond. 818 P.2d at 14. That difficulty also exists with other torts and when an intangible injury is inflicted, the defendant should stand the risk of the indefinite standards for an award of damages rather than depriving the injured party of a remedy. *Norton* at 14. “When a third person is at fault for the breakdown of a marriage, the law ought to provide a remedy.” *Norton* at 14.

While discussing the difficulty in proving causation, the court stated, “[w]e are unwilling to adopt a rule of law that would foreclose all remedies on the questionable assumption that any plaintiff whose marriage has gone aground ‘must have deserved it.’ We prefer to consider the state of the marriage and the actions of both spouses as relating to causation and damages.” *Nelson* at 1217.

Missouri continues to recognize a claim for loss of consortium derivative of an injured spouse’s claim. See *Wright v. Barr*, 62 S.W.3d 509 (Mo.App.W.D. 2001); *O’Neal v. Agee*, 8 S.W.3d 238 (Mo.App.E.D. 1999); and *Townsend v. Townsend*, 708 S.W.2d 646 (Mo.banc 1986). The claim encompasses the other spouse’s loss of affections, care, companionship, and services due to the conduct of the tortfeasor. *Wright*, 62 S.W.3d at 537. These damages are no less speculative than those in a cause of action for alienation of affections.

The development and expansion of tort law makes the argument that damages in these types of action are intangible and speculative anachronistic. *Corbett*, *supra* at 1018. The concerns with the special problems presented by emotional injuries have not been

found by courts to be an adequate reason to refuse to recognize the injuries and a right of recovery. *Id.* [B]lameworthy conduct does cause damages, whether it breaks up a marriage or not.” Corbett, *supra* at 1021. “A spouse’s expectation of sexual fidelity within marriage has been destroyed, and regardless of whether the marriage is destroyed, that is an emotional harm directly traceable to the acts of the interloper. *Id.* When the plaintiff claims the interloper destroyed the marriage, the causation and degree of fault issues are no more difficult than in many other types of tort cases. *Id.*

G. Public policy supports the continuation of the cause of action for alienation of affections.

Appellant suggests that the cause of action should be abolished for public policy reasons. In *Hoover’s Dairy*, the Missouri Supreme Court articulated several factors that the court should consider in deciding whether or not to recognize a legal duty based on public policy. *Hoover’s Dairy, Inc. v. Mid-America Dairymen*, 700 S.W.2d 426, 432 (Mo.banc 1985). Those factors include: (1) the social consensus that the interest is worthy of protection; (2) the foreseeability of harm and the degree of certainty that the protected person suffered injury; (3) moral blame society attaches to the conduct; (4) the prevention of future harm; (5) consideration of cost and ability to spread the risk of loss; and (6) economic burden upon the actor and the community.” 700 S.W.2d at 432.

Applying these factors to the legal duty not to interfere in a marriage relationship, it is plain that alienation of affections should remain a valid cause of action.

Critics of the cause of action for alienation of affections say that the law should not attempt to legislate morality. Corbett, *supra* at 1017. “It is absurd to suggest that the law bears no relationship to morality.” *Id.*

As noted by Professor Corbett above, most of the reasons articulated by legislatures, courts and commentators are superficial reasons selected from a “cookie cutter” list and they lack rigorous analysis. Corbett, *supra* at 992. The reasons articulated are not adequate to deny relief for so great a harm and so great a wrong. Corbett, *supra* at 1011.

H. Other Rationale in Support of This Cause of Action.

1. Comparable to Tortious Interference With Contract

It is also important to note that the law recognizes the theory of tortious interference with contract in order to protect business expectations. Should not the same theory be applied to protect the expectations of a continued marriage?

Judge Robertson touched upon this notion in his dissent in *Thomas*. *Id.* at 742-744. Judge Robertson first noted that marriage is a “civil contract,” as provided in Section 451.010, R.S.Mo. “The relationship that results from the entry of two persons into such a contract is one that the state seeks to foster and preserve where possible because of the societal stability marriage lends.” *Id.* at 742. Judge Robertson noted that alienation of affections is a species of the tort genus interference with contract. *Id.* “To a degree not present in most other torts, however, criminal conversation and alienation of affection actions speak to the core moral concerns society wishes to claim for itself and

foster in its members.” *Id.* It seems illogical to allow a business to sue when it loses a key employee or key contract, and yet prohibit a former spouse from seeking redress when he or she loses a spouse due at least in part to the tortuous interference of the third party.

2. Used As The Premise Upon Which Criminal Conversation Was Abolished

It is worth noting again that when this Court abolished criminal conversation, it did so in large part based upon the continued validity of alienation of affections. *Thomas*, 869 S.W.2d at 741. Without this remedy, there is no legal opportunity to recover for the wrongful actions of third parties who interfere in a marriage.

3. Tort Law Is Generally Expanding, Not Contracting

American tort law has changed in ways that seem inconsistent with the abrogation of these torts. *Corbett*, *supra* at 997. Tort law has expanded substantially such that where victims of injuries have been identified, tort law generally has sought to provide remedies. *Id.* Tort law has shifted its virtually exclusive focus on protecting the interests of person and property and increasingly has protected the interests in relationships and emotions. *Id.*

This is exactly what happened when this Court abolished the interspousal immunity doctrine in *Townsend* and *S.A.V.*, In light of those cases, no justifiable reason exists to now restrict or prohibit this cause of action.

4. Perhaps This Should Be Left Up to the Legislature

If this Court is of the opinion that the cause of action for alienation of affections should perhaps be abolished, Respondent respectfully suggests that it should consider the admonitions of former jurists Donnelly and Welliver. Justice Donnelly authored the dissent in *Townsend*. 708 S.W.2d at 651. He wrote, “I do not argue that this Court is without power to abrogate interspousal immunity in Missouri. I do agree that the power should be exercised with some evidence of restraint. I merely submit that the question of abolishing interspousal immunity should be decided by the people or by the elected representative and not by this Court.” *Id.* at 651.

Similarly, Justice Welliver, (*concurring in part and dissenting in part*) in *S.A.V. v. K.G.V.*, 708 S.W.2d (Mo. banc 1986), noted that it was a matter of policy whether or not this Court should abolish the doctrine of interspousal tort immunity. *Id.* at 654. “I cannot, however, agree that this Court and not the legislature should make the decision with respect to negligence actions between spouses.” *Id.*

II. The trial court did not err in not directing a verdict in favor of the appellant at the close of evidence or not granting judgment n.o.v. because the respondent proved a submissible case of alienation of affections, in that appellant pursued a course of conduct that had the natural and probable consequence of alienating the affections of respondent's spouse including repeated phone calls, sending cards, flowers and gifts, meeting respondent's husband at the gym, and ultimately engaging in an adulterous relationship with him.

Standard of Review

The standard of review of a denial of a judgment notwithstanding the verdict is essentially the same as for the review of denial of a motion for a directed verdict. *Giddens v. Kansas City Southern Railway Co.*, 29 S.W.3d 813, 818 (Mo.banc 2000). "In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict. *Giddens*, 29 S.W. 3d at 818. The question presented in a motion for judgment notwithstanding the verdict is whether at the close of all of the evidence, the plaintiff made a submissible case. *Incentive Realty, Inc. v. Hawatmeh*, 983 S.W.2d 156, 161 (Mo.App.E.D. 1998). "A case may not be submitted to the jury unless each and every fact essential liability is predicated upon legal and substantial evidence." *Giddens at 818*. Unless there is a complete lack of probative evidence to support it, a

jury verdict will not be overturned. *Giddens* at 818; *George Weis Company, Inc. v. Dwyer*, 956 S.W.2d 335, 338 (Mo.App.E.D. 1997).

The cause of action for alienation of affections is based on inherently wrongful acts of the defendant, intentionally done, which have the natural and probable consequence of alienating the affections of the spouse of the plaintiff, and, which in the particular case, had that result. *Gibson v. Frowein*, 400 S.W.2d 418, 421 (Mo.banc 1966). To state a claim for alienation of affections, a plaintiff must allege that (1) the defendant engaged in wrongful conduct, (2) the plaintiff lost the affections or consortium of her spouse, and (3) there was a causal connection between the defendant's conduct and the plaintiff's loss. *Gibson*, 400 S.W. 2d at 421. "The term 'consortium,' as it is used in the context of an alienation of affections action, refers to the plaintiff's right to the affection, society, assistance, companionship, and conjugal fellowship of his spouse." *Muchisky v. Kornegay*, 741 S.W.2d 43, 47 (Mo.App.E.D. 1987).

Appellant in this case asserts that respondent failed to prove a submissible case for alienation of affections, in that the only evidence of any alleged wrongful conduct on the part of the appellant occurred after respondent's husband had already filed for divorce. Appellant further contends that respondent failed to produce substantial evidence that appellant acted wrongfully and intentionally so as to cause respondent's husband's affections to shift from respondent to appellant or that respondent's husband's affections did in fact shift because of appellant's conduct.

A. The Defendant's Wrongful Conduct

The evidence at trial was that respondent and her husband had had some problems in their marriage in 1999, but they had worked through those problems and had made the decision to conceive a second child (Tr. 230-231). David Helsel testified that as of December 1999, he wanted to make his marriage to Katherine Helsel work (Tr. 354). During approximately that same period of time, appellant, Sivi Noellsch, began to actively pursue David Helsel (Tr. 122-128). As early as Christmas of 1999, Sivi was sending gifts to David, including silk boxers and a watch (Tr. 127). Sivi also began calling him and sending flowers and cards to him at his place of business (Tr. 128). Her actions at this time made David's office manager feel uncomfortable (Tr. 124) Sivi and David began meeting at the gym on a regular basis in February of 2000 (Tr. 70).

By the end of March of 2000, Sivi was calling David Helsel at work and on his cell phone as many as eight times a day (R.A. A5). In April of 2000, Sivi initiated almost one hundred and twenty calls to David (R.A. A5-A16). Twenty of these calls were between the hours of 10:00 p.m. and 8:00 a.m., and eight were between the hours of midnight and 6:00 a.m. (R.A. A5-A16). Sivi initiated one hundred and twenty-eight calls to David in the month of May and these calls were placed at all hours of the day and night (R.A. A16-A-30).

On May 12, 2000, the day of the birth of Katherine and David Helsel's second child, Sivi initiated six calls to David and another call at 1:36 a.m. the following morning (Tr. 101, 103; R.A. A24). The jury was free to assume that on this day, when it was at least possible for David Helsel to reconsider leaving his wife, Sivi initiated these calls to

keep her claws in him. The only day between March 30 and May 31, a sixty-two day time period, that Sivi did not initiate at least one call to Katherine's husband was April 27, 2000 (R.A. A5-A29).

Until after Mrs. Poese's damaging testimony, David Helsel maintained that they had parted on good terms (Tr. 109). In a desperate attempt to discredit her, David testified that she had flirted with him (Tr. 189). This directly contradicted his other sworn testimony (Tr. 189). In perhaps the greatest display of arrogance and lack of any remorse, Sivi Noellsch suggested that Mrs. Poese was "jealous of her" (Tr. 479).

By the second or third week of June, Sivi Noellsch began openly going on dates with David Helsel (Tr. 70, 459, 461). David claims the relationship turned into a physical relationship in June of 2000 (Tr. 159). Both David and Sivi admit that they had an open, physical relationship as early as June of 2000, well before Katherine and David were divorced on January 12, 2001 (Tr. 68, 159). Sivi admittedly engaged in sexual intercourse with David Helsel and began having an affair with him prior to the Katherine's divorce from her husband (Tr. 68).

Sivi Noellsch's allegation that there was not a sexual relationship until after David Helsel filed for divorce does not prevent her from being found liable for alienating his affections. Alienation of a spouse's affections could result even in the absence of adultery. *Muchisky v. Kornegay*, 741 S.W.2d 43, 47 (Mo.App.E.D. 1987). The jury was also free to disbelieve the testimony of Sivi Noellsch and David Helsel that they were not in a romantic relationship until after David had filed for divorce. Given numerous

inconsistencies in their testimony, the jury likely believed that a sexual relationship had started much earlier than Appellant was willing to admit.

B. The Plaintiff Lost the Affections or Consortium of Her Spouse

There was much testimony by David Helsel that he had no affection for his wife after December of 1999 (Tr. 168, 349). The testimony was that this was the same time that the Sivi Noellsch began sending him gifts and calling him at his office (Tr. 122-127). It is no defense to an action for alienation of affections that the plaintiff's spouse had little or no affection for plaintiff at the time of the alleged wrongful acts of the defendant. *Comte v. Blessing*, 381 S.W.2d 780, 784 (Mo. 1964); *Van Vooren v. Schwarz*, 899 S.W.2d 594, 595 (Mo.App.E.D.1995). A stranger has no right to intermeddle or to seek an advantage to herself on account of a delinquency in the relationship between a husband and wife. *Moranz v. Scheller*, 525 S.W.2d 785, 787 (Mo.App. 1975).

A third party, the appellant in this case, has no right to interfere or cut-off any chance of affections springing up in the future between the petitioner and her spouse. *Van Vooren*, 899 S.W.2d at 595. In *Van Vooren*, plaintiff's spouse stated that his marriage to the plaintiff had been irretrievably broken for years prior to the dissolution of marriage and the actions of the Appellant were not the cause of the breakdown of the marriage. The court stated that this was not a meritorious defense. *Id.* at 595. This issue was also raised in *Comte v. Blessing*, 381 S.W.2d 780 (Mo. 1964). The defendant stated that no affection existed between plaintiff and his wife, and therefore, there was nothing to destroy or deprive plaintiff of. *Comte*, 381 S.W.2d at 784. The court noted that, prior

to the entrance of defendant into the picture, plaintiff and his wife were living together and she had given birth to their children. *Id.* “Under such circumstances some affection can be presumed.” *Id.*

There is no dispute that Katherine Helsel lost the affections and consortium of David Helsel. They were divorced on January 12, 2001. Although there is some dispute about when those affections were lost, it is not truly relevant in this case. As discussed above, Katherine Helsel was pregnant with David Helsel’s second child at the time Sivi Noellsch began pursuing him. They were still living together as husband and wife and were still engaging in sexual intercourse. Under the rationale in *Comte*, some affection between them can be presumed under the circumstances.

C. There Was a Causal Connection Between the Defendant’s Conduct and the Plaintiff’s Loss

The causal connection between the acts of the appellant and respondent’s loss of the affections of her husband was clearly shown in this case. Acts that have the natural and probable consequence of alienating the affections of the plaintiff’s spouse are deemed wrongful by law. *Thornburg v. Federal Express Corp.*, 62 S.W.3d 421 (Mo.App.W.D. 2001). A defendant need not, however, have intended to cause an alienation of affections between a plaintiff and spouse, the defendant need only have intended to do the acts that resulted in the loss of consortium between spouses. *Miller v. Neill*, 867 S.W.2d 523, 526 (Mo.App.E.D.1993). Intent is rarely susceptible of direct proof but usually must be inferred from acts and conduct. *Gibson*, 400 S.W.2d at 421.

As in other situations, in an action for alienation of affections, a person is presumed to intend the natural and probable consequences of her voluntary acts. *Miller*, 867 S.W.2d at 526. In order to show causal connection, it is sufficient if the facts proved are of such a nature and are so connected and related to each other that the conclusion therefrom may be fairly inferred. *Sanders v. Wallace*, 817 S.W.2d 511, 515 (Mo.App.E.D. 1991).

The placing of two hundred and seventy telephone calls by Sivi Noellsch to David Helsel between March 30th and May 31st was a voluntary act by appellant. She chose to call him six times on the day his second child was born, and again at 1:36 a.m. the next morning. Working out with David Helsel at the gym was a voluntary act. She chose to visit him at his place of work. She chose to wear revealing clothing around him. Sending David Helsel gifts, cards, letters and flowers was voluntary. She chose to begin dating David Helsel, although she knew that he was still married. She chose to begin having sexual intercourse with him. She chose to ignore the pleas of Katherine Helsel to stay away from her husband when she confronted her at the gym. She chose to continue in her sexual relationship with David after Katherine confronted her. She chose to go on trips with him to St. Louis, Kansas City and Branson while his wife and children were at home. The alienation of the affections of David Helsel from respondent was a natural and probable consequence of these intentional, voluntary actions.

A reasonable jury could infer, as did the jury in this case, that there was a causal connection between the conduct of the appellant and respondent's loss of the affections of her husband.

Conclusion

The Helsel marriage was not a perfect marriage. Few marriages are perfect. The law was not designed to protect just perfect marriages. Instead, this law is meant to discourage interference in *any* marriage. Ironically, those marriages struggling to deal with daily problems are those that need the greatest protection to help insulate spouses from falling prey to interlopers.

In this marriage, Sivi Noellsch wrongfully interfered knowing that Katherine Helsel was soon to give birth to her second child with David Helsel. She did so brazenly, intentionally and with complete indifference to her conduct's effects on the Helsel family. This Court should sustain the jury's unanimous verdict in this case.

Equally important, this Court should end the debate over the validity of this cause of action, and hold that Missouri plaintiffs may continue to recover for the wrongful actions of third parties who interfere in marital relationships. This case clearly demonstrates why there is a need to affirm the continued viability of this cause of action.

Respondent respectfully suggests that public policy and sound legal analysis require this Court to affirm this verdict and decline to abolish the tort of alienation of affections.

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I hereby certify that the disk enclosed has been scanned for viruses and is virus free and that I used Microsoft Word for word processing. I further certify that this brief complies with Rule 84.06(b) word limitations and that the brief contains 11,579 words.

Attorney

Certificate of Service

I hereby certify that I mailed a disk and a copy of the Brief of the Appellant to Dennis Owens, Attorney, 7th Floor, Harzfeld's Building, 1111 Main Street, Kansas City, Missouri 64105, counsel for Appellant, on this 24th day of April, 2003.

Attorney