

# Who Said Love Doesn't Cost A Thing?

## The Continuing Viability of Alienation of Affection Claims and the Question of Whether the Judiciary Can (or Should) Effectively Commoditize Affairs of the Heart

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“... my blood approves, and kisses are a better fate than wisdom”

- E.E. Cummings,  
“Since Feeling is First” (1926)

Mr. Cummings, meet Jerry Fitch, Sr. When the United States Supreme Court declined to grant certiorari to the Holly Springs, Mississippi businessman this past January, thereby exhausting his appeal of the Mississippi Supreme Court’s decision affirming a \$750,000 alienation of affection verdict, the issue of whether the judicial system can, or should, provide redress for romantic grievances was again thrust into the national conscience. And Mr. Fitch was, for lack of better terminology, out \$750,000.

Part of Mr. Fitch’s problem, some might say, was his residency. In addition to Mississippi, only six (6) other states, Hawaii, Illinois, New Mexico, North Carolina, South Dakota and Utah, still allow claims alleging “spousal theft.” As Mr. Fitch proclaimed on ABC Network’s “Good Morning America,” the tort of alienation of affection “needs to be off the books. This is not right.”<sup>1</sup>

The notion of property, or, more specifically, a person as property, lies at the heart of both the origins of alienation

of affection law, and, at least to a certain extent, the controversy that surrounds the cause of action. As recognized by the Mississippi Supreme Court, the tort of alienation of affection “originated on the common-law belief that wives were the chattel of their spouse.” *Saunders v. Alford*, 607 So.2d 1214, 1215-16 (Miss. 1992).

Given these analogies, it is easy to understand the controversy surrounding the continuing viability of alienation of affection as a cause of action. Given the sheer number of states that have, either judicially or legislatively, abolished the tort, an explanation of the continuing viability (propriety?) of what many view as an archaic relic of the common law, inconsistent with modern times, would seem warranted.<sup>2</sup>

### A. Elements of Alienation of Affection

As set forth in the Mississippi Supreme Court’s decision in *Fitch*:

The commonly stated elements of the tort of alienation of affections are “(1) wrongful conduct of the defendant; (2) loss of affection or consortium;

and (3) causal connection between such conduct and loss.” *Saunders*, 607 So.2d at 1215. See also *Camp v. Roberts*, 462 So.2d 726, 727 (Miss. 1985) (“where a husband [wife] is wrongfully deprived of his [her] rights to the ‘services and companionship and consortium of his [her] wife [husband],’ he [she] has a cause of action ‘against the one who has interfered with his [her] domestic relations.’ ... The husband [wife] might then sue for ... alienation of affection ...”). This Court has recognized that persuasion, enticement, or inducement which causes or contributes to the abandonment is a necessary component of “wrongful conduct.” Justice Dickinson recognized in *Children’s Medical Group v. Phillips*, 940 So.2d 931 (Miss. 2006) that in order “to maintain this action it *must* be established that the husband [wife] was *induced* to abandon the wife [husband] by some active interference on the part of the defendant.” *Id.* at 934 (quoting *Stanton v. Cox*, 162 Miss. 438, 452, 139 So. 458, 460 (Miss. 1932) (emphasis added).

*Fitch v. Valentine*, 959 So.2d 1012, 1025-26 (Miss. 2007).

### B. The Origins of Alienation of Affection: Judicial Intelligent Design or Legal Darwinism?

While Jerry Fitch complains that it marginalized his bank account, others see the tort as serving an admirable purpose

<sup>1</sup> <http://abcnews.go.com/TheLaw/story?id=4108324&page=1>

<sup>2</sup> To obtain a specific list of the states abolishing claims for alienation of affection, as well as the method employed in accomplishing the same, see Justice Dickinson’s comprehensive history and critique of the tort, contained in his extremely thoughtful concurrence in Mississippi Supreme Court’s decision in *Fitch v. Valentine*, 959 So.2d 1012, 1030-37 (Miss. 2007) (Dickinson, J., specially concurring) (Miss. 2007).

that should not be abandoned merely for convenience or to suit modern trends. In order to understand the underpinnings of the differing opinions held by proponents and opponents of alienation of affection, it is helpful to examine the cause of action's origins:

The tort of alienation of affections was recognized in Mississippi as early as 1926 in *McRae v. Robinson*, 145 Miss. 191, 110 So. 504 (1926). In *Camp v. Roberts*, 462 So.2d 726, 727 (Miss. 1985), this Court held "[w]here a husband [wife] is wrongfully deprived of his rights to the 'services and companionship and consortium of his [her] wife [husband],' he [she] has a cause of action 'against one who has interfered with his [her] domestic relations.'" *Id.* at 727 (citing *Walter v. Wilson*, 228 So.2d 597, 598 (Miss. 1969), *overruled in part on other grounds; Saunders v. Alford*, 607 So.2d 1214, 1219 (Miss. 1992)).

*Bland*, 735 So.2d at 422 (Smith, J., specially concurring) (emphasis added).

Going back a bit further:

In order to maintain pure bloodlines and discourage adultery, Teutonic tribes required a wife's lover to compensate the husband for his wife's infidelity, allowing the husband to buy a new wife and ensure the legitimacy of his offspring. *Hoye v. Hoye*, 824 S.W.2d 422, 423-24 (Ky. 1992) (citing Lippman, *The Breakdown of Consortium*, 30 Colum. L.Rev. 651, 655 (1930)). The Anglo-Saxons later allowed actions for marital interference

on the premise that wives were valuable servants to their husbands. *Helsel v. Noellsch*, 107 S.W.3d 231 (Mo. 2003). The action was analogous to a master's claim "against one who enticed away his servant, in whose services the master held a quasi-property interest." *O'Neil v. Schuckardt*, 112 Idaho 472, 733 P.2d 693, 696 (1986). Thus, in keeping with this belief, a husband could "vindicate" his loss in the marital relationship through an action for alienation of affections, but a wife was not afforded the same right. *Helsel*, 107 S.W.3d at 232.

*Fitch*, 959 So.2d 1030-31 (Dickinson, J., specially concurring).

Not surprisingly, opponents of alienation of affection routinely employ its history as support for the proposition that the tort remains sexist in nature, notwithstanding any compliance with the mandates of equal protection.<sup>3</sup> As Justice Dickinson further observed:

... [C]onsent was historically prohibited as a defense to alienation actions "based on the legal inferiority of the wife who was deemed incapable of consenting to the injury of her superior, her husband." *Hoye*, 824 S.W.2d at 425 (citing H. Clark, *The Law of Domestic Relations in the United States*, § 4.2, p. 267 (1987)). And even though the cause of action has supposedly moved beyond those outdated roots, consent remains a prohibited defense today, *id.*, as today's case demonstrates. As one commentator noted, "[t]he idea that one spouse can recover for an act the other spouse has willingly consented to is perhaps better suited to an era that regarded one spouse as the

property of another." Prosser and Keeton, *The Law of Torts*, § 124 at 917 (5th ed.1984).

*Fitch*, 959 So.2d at 1032 (Dickinson, J., specially concurring).

### ***C. The Past Is Not Passé: Mississippi's Justification for Alienation Of Affection***

As stated by the Mississippi Supreme Court, "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....'" *Bland v. Hill*, 735 So.2d 414, 417 (Miss. 1999) (quoting *Saunders*, 607 So.2d at 1215). As the current Chief Justice of the Mississippi Supreme Court, Jim Smith, explained in his special concurrence in the *Bland* decision:

Should an individual be allowed to intrude upon a marriage to such an extent as to cause it to come to an end? Does a spouse have a valuable interest in a marriage that is worthy of protection from the intruding third party? In my view, the answer to both questions is in the affirmative. 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 espoused by this Court in *Saunders* as entitling a spouse to "protection of the love, society, companionship, and comfort that form the foundation of a marriage." I do not believe that under the compelling facts of this particular case this Court should hold that the doctrine of alienation of affections has outlived its usefulness as a deterrent protecting the marital relationship of a husband and

<sup>3</sup> Under Mississippi law, "the tort of alienation of affections is equally applicable to women as men." *Fitch v. Valentine*, 959 So.2d 1012, 1019, FN 10 (Miss. 2007) (citing *Kirk v. Koch*, 607 So.2d 1220, 1224 (Miss.1992)). According to Justice Randolph, this fact "avoid[s] any archaic notion that a wife is the property of her husband." This writer, having recently become engaged to be married, can only hope that such likewise avoids the notion, however archaic or realistic, that a husband is the property of his-wife.

wife in cases where the facts clearly warrant.

The dissent states that this tort serves no legitimate purpose whatsoever in modern society, but rather, has simply been extended past its time. This is somewhat akin to the view that “everybody else is doing it, so should I.” While I agree that it appears society’s moral values have changed during modern times, I do not believe Mississippi should get aboard this runaway train. I would also not 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.

*Bland v. Hill*, 735 So.2d at 422 (Smith, J., specially concurring) (internal citations omitted).

Similarly, writing for the majority in *Fitch*, Justice Randolph reasoned as follows:

I cannot adopt the position of a majority of states and minimize this activity which the legislature has defined as a crime against public morals and

decency, and declared its penalty comparable to similar conduct between a teacher and pupil or a guardian and ward. The Legislature has not seen fit to join the throngs who say these are only “affairs of the heart,” “flings,” or “stepping out,” as a means of attaching validity to such conduct.

*Fitch*, 959 So.2d at 1019, FN 11 (citing Miss. Code Ann. § 97-29-1, *et seq.*).<sup>4</sup>

#### ***D. A Plea for Modernity: The Case Against Alienation of Affection***

The debate over alienation of affection involves more than just concerns about perceived notions within the law relating to the role of women in society and modern morality. At the end of the day, it is the conduct of presumably consenting adults that causes such a claim to arise, a fact that in turn gives rise to a whole new realm of criticism for the law’s continuing existence.

As acknowledged by Justice Dickinson, one of the problems with alienation of affection claims is that the elements are simply too vague:

The element of “inducement” often proves perplexing, as the factfinder must determine whether the defendant or the alienated spouse was primarily

responsible for the other spouse straying.

*Fitch*, 959 So.2d at 1034-35 (Dickinson, J., specially concurring); see also *Stanton*, 162 Miss. at 453, 139 So. at 461-62 (holding that “a stranger may, without liability, harbor a wife who has left her husband,” so long as he does not persuade the wife to leave her husband).<sup>5</sup>

The element of “wrongful conduct” is no less perplexing. This primary element of alienation of affection has, depending on one’s point of view, either evolved with time or become so elastic that it has lost all tangible meaning. In *Stanton v. Cox*, it was held that, to maintain a claim for alienation of affection, it must be established that the wife was “induced to abandon” her husband “by some active interference on the part of the defendant.” *Stanton*, 162 Miss. at 450, 139 So. at 460. At some point, “active interference” became synonymous with “direct interference” with a marriage by a third party. *Kirk v. Koch*, 607 So.2d 1220, 1222 (Miss. 1992) (holding that, in order to sustain an action for alienation of affection, it must appear that there has been “direct interference on the defendant’s part, sufficient to satisfy the jury that the alienation was caused by the defendant, and the burden of proof is on the plaintiff to show such interference ...”). As with *Fitch*, “wrongful conduct” is defined, however loosely, as conduct

<sup>4</sup> Section 97-29-1 provides as follows:

If any man and woman shall unlawfully cohabit, whether in adultery or fornication, they shall be fined in any sum not more than five hundred dollars each, and imprisoned in the county jail not more than six months; and it shall not be necessary, to constitute the offense, that the parties shall dwell together publicly as husband and wife, but it may be proved by circumstances which show habitual sexual intercourse.

Miss. Code Ann. § 97-29-1 (2007).

Justice Randolph’s citation to Section 97-29-1 seems at odds with the *Saunders* case, which observed that “[t]he existence of criminal sanctions for conduct involving adultery affords plaintiff nothing.” *Saunders*, 607 So.2d at 1219 (emphasis added).

<sup>5</sup> One obvious question that seems to have been left somewhat unresolved by the case law is whether knowledge of the underlying marriage is required to sustain a claim for alienation of affection. Notwithstanding the seemingly inherent requirement that inducement and/or wrongful conduct would require intent on the party guilty of such conduct, the Mississippi Court of Appeals has extended the tort a three (3) year statute of limitations, rather than the one (1) year limit that typically applies to intentional torts. *Hancock v. Watson*, 962 So.2d 627, 631 (Miss. Ct. App. 2007); *Carr v. Carr*, 784 So.2d 227, 230 (¶ 8) (Miss. Ct. App. 2000). That being said, there is certainly a suggestion that knowledge of the underlying marriage is inherent to the element of “wrongful conduct” in alienation of affection claims. In *Stanton*, the Mississippi Supreme Court offered the following relevant discussion:

In an action for alienation of affection brought by an injured spouse, there must needs [sic] be a wrongful act on the part of the other spouse with a stranger, ...

On the other hand, [the defendant’s] frank admission that she encouraged Cox to assume the relation of a lover to her, inducing him in every way possible to carry on that relation, even becoming engaged to him, *although she knew that Cox was living with his wife*, and not divorced from her, was a wrongful act on her part, which is emphasized by the fact that after Cox notified her that he had effected a reconciliation with his wife, and Mrs. Stanton had consented to abide by that reconciliation she thereafter wrote him, ... “We must not lose each other.” *This tends to show a willful and active interference* with the injured wife’s right to the consortium or conjugal society, which is the basis of this character of action.

*Stanton*, 162 Miss. at 450-51, 139 So. at 461 (emphasis added).

constituting "persuasion, enticement, or inducement, [which] caused or contributed to the abandonment of the marriage and/or the loss of affections by active interference."<sup>6</sup>

As some have argued, the indefinite elements of alienation of affection's have resulted in an equally nebulous concept of damages. In the words of Justice Dickinson:

The awarding of damages presents another distinct problem in these actions, as no clear standards for compensating the plaintiff exist. This opens the door for quasi-punitive damage awards, disguised as actual damages, which are usually tainted by passion and prejudice.

*Fitch*, 959 So.2d at 1035 (Dickinson, J., specially concurring) (internal citations omitted).

#### ***E. "Criminal Conversation" - Wonderfully Named and Wisely Abolished***

In the context of Mississippi's continuing recognition of alienation of affection, the historical relation between this tort and that of "criminal conversation" must be observed. Like alienation of affection:

The tort of criminal conversation came into existence primarily because of the great importance that feudal society placed on insuring that the right of inheritance to property, title, and office descended to legitimate children only. Conflicting claims

to titles, property, and estates could lead to discord and even violence. The law afforded a remedy designed to prevent illegitimate children by allowing a husband to sue another man who had intercourse with his wife.

*Norton v. Macfarlane*, 818 P.2d 8, 16 (Utah 1991) (citations omitted).

The relation between alienation of affection and criminal conversation was expressly recognized by the Mississippi Supreme Court in *Saunders*, where the tort of criminal conversation was abolished on the basis that such had "outlived its usefulness":

The torts of alienation of affection and criminal conversation, also known as "heart balm" actions, originated on the common-law belief that wives were the chattel of their spouse. 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 the marriage ..."

\* \* \*

**The tort of criminal conversation, on the other hand, is no more or less than an act of adultery between the defendant and the plaintiff's spouse. ...**

*Saunders*, 607 So.2d at 1215-16 (emphasis added) (internal citations omitted).<sup>7</sup>

At common law, a claim for criminal conversation "was made upon the plaintiff's proof that, while married to the plaintiff, the plaintiff's spouse and the defendant engaged in at least one single act of sexual intercourse." *Fadgen v. Lenkner*, 469 Pa. 272, 365 A.2d 147, 149 (Pa. 1976). One of the primary concerns favoring abolition of criminal conversation was the fact that it was no defense that the defendant "did not know the wife was married but believed her to be single," or that "the wife represented herself as single ... ." *Id.* at 1217 (citing *Hunt v. Hunt*, 309 N.W. 2d 818 (S.D. 1981) (emphasis added).

#### ***F. More Modern Viewpoints, Or More Modern Rubbish?***

Without a doubt, the judicial consternation and general hand wringing that accompanies the tort of alienation of affection is the fact that the voluntary conduct of an apparently willing adult, one who ultimately faces no ramifications, is needed to complete the cause of action. As stated by Justice Harris, in his opening salvo abolishing the cause of action under Iowa law, "[w]e have become convinced that there is an inherent and fatal contradiction in the term 'alienation of affections.' **The alienation belies the affection.**" *Fundermann v. Mickelson*, 304 N.W.2d 790, 791 (Iowa 1981) (emphasis added).

Justice Harris's critique would seem only more potent for Jerry Fitch, who shared with Sandra Valentine the presumable displeasure of having a jury assess the financial ramifications of their relationship at three-quarters (¾) of a million dollars, but who (again, presumably) endured in solitude the

<sup>6</sup> Obviously uneasy with the vagueness accompanying claims for alienation of affection, Justice Dickinson included the following in his special concurrence in *Fitch*: The Kentucky Supreme Court, quoting Justice Holmes, described the unfortunate rise of the legal fiction buttressing the common law tort of alienation of affections:

[A] common phenomenon ... familiar to the students of history, is this. The customs, beliefs or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity, disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things and then the rule adapts itself to the new reasons which have been found for it, and enters a new career. The old form receives a new content and in time even the form modifies itself to fit the meaning which it has received.

*Fitch*, 959 So.2d at 1032 (Dickinson, J., specially concurring) (quoting *Hoye*, 824 S.W.2d at 425); see also *Helsel*, 107 S.W.3d at 233 ("When the reason for a rule of law disappears, so too should the rule.").

<sup>7</sup> While *Saunders* may have ended the possibility of civil liability for "an act of adultery" between a person and another person's spouse, Section 97-29-1 continues to ensure that criminal liability remains a possibility. Miss. Code Ann. § 97-29-1 ("If any man and woman shall unlawfully cohabit, whether in adultery or fornication, they shall be fined in any sum not more than five hundred dollars each, and imprisoned in the county jail not more than six months.").

added humiliation of actually having to pay.<sup>8</sup> This same perspective seems to have caught the attention of Justice Dickinson, who opined as follows:

... [T]he fact is that actions for alienation of affections arise from the willing participation of one spouse. While the tort purportedly exists to discourage third-parties from disturbing the marital relation, in reality the marriage is unlikely to weaken without one spouse actively consenting to the wrongful interference. **Human experience is that the affections of persons who are devoted and faithful are not susceptible to larceny no matter how cunning or stealthful.**

\* \* \*

The tort is inherently unplanned, especially where sexual activity is involved, so the idea that the parties would contemplate the possibility of a lawsuit and be deterred is unrealistic. The truth remains that a spouse inclined to engage in an extramarital affair will do so, and even if a would-be paramour would be thereby dissuaded [by the threat of suit], a substitute is likely to be readily found.

*Fitch*, 959 So.2d at 1033-34 (Dickinson, J., specially concurring) (internal citations and quotations omitted); see also *Fadgen v. Lenkner*, 469 Pa. 272, 280-81, 365 A.2d 147, 151 (1976) (holding that “the cause of action itself is an anachronism and that in today’s society it is unreasonable to impose upon a defendant such harsh results without affording any real

opportunity to inject logically valid defenses on the merits such as the role of the plaintiff’s spouse in the adulterous relationship or the quality of the plaintiff’s marriage prior to the occurrence of the acts constituting the tort.”) (emphasis added).<sup>9</sup>

### G. Conclusion

The debate of jurists, often rewarding to barristers, is obviously fervent in the context of alienation of affection. While both the justifications and critiques of the tort have changed with time, that process has rendered two current schools of thought, eloquently stated by two of our Supreme Court Justices:

One dissent suggests that “these suits inevitably do more to hurt families than to help them.” I find more persuasive the counter-argument that damage actually arises from the adulterous conduct which first violates, and then destroys, the trust of not only the participants, but also of their respective families. To minimize and cast as theoretical the obvious negative consequences, such as the erosion of the marital relationship and the disruption to family unity ignores these empirical truths. The dissent’s fatalistic presupposition that marriages experiencing affairs will “crash and burn,” fails to recognize the reality of forgiveness and reconciliation.

*Fitch*, 959 So.2d at 1020, FN 12.

The theory that alienation actions must be retained as a

means of preserving marriages and protecting families must fail for lack of support. While an admirable sentiment, these suits inevitably do more to hurt families than to help them. In my view, when a marriage has crashed and burned, the law should not provide an imprimatur to fan the coals of anger and resentment, extending further into the future the time when healing can begin. This is particularly true where children are involved. Enough difficulty exists already in the development of a civil relationship among divorced parents and the children of the marriage.

*Fitch*, 959 So.2d at 1033-34 (Dickinson, J., specially concurring) (internal citations and quotations omitted).

So long as alienation remains, in the words of Jerry Fitch “[on] the books,” so too will its critics. As stated by Justice Dickinson:

In Mississippi, though, the legal fiction that the common law tort of alienation of affections preserves a spouse’s right to the mind and body of a partner continues to this day, only now it is masked as the means to stabilize the marital union.

*Fitch*, 959 So.2d at 1032 (Dickinson, J., specially concurring).<sup>10</sup>

If nothing else, the Mississippi Supreme Court’s decision in *Fitch v. Valentine*, 959 So.2d 1012 (Miss. 2007) likely ensures that such claims will remain viable in Mississippi for the foreseeable future. ■

<sup>8</sup> This same point is echoed in Justice Dickinson special concurrence in *Fitch*:

No party involved in an action for alienation of affections emerges unscathed. While the harm to the defendant and unfaithful spouse is clear, “the action [also] diminishes the plaintiff’s dignity and injures his [or her] own reputation through the process of seeking money damages.”

*Fitch*, 959 So.2d at 1034 (Dickinson, J., specially concurring) (internal citations omitted).

<sup>9</sup> This same logic appears to have fueled the *Saunders* Court’s abolition of criminal conversation:

To the extent that the tort of criminal conversation provides a cause of action for adultery when the marriage commitment is dead, it serves no useful purpose in awarding damages.

*Saunders*, 607 So.2d at 1217 (quoting *Norton*, 818 P.2d at 16-17 (reasoning that the tort “imposes total liability for the act of two people on only one of them.”)).

<sup>10</sup> While citation avoids plagiarism, it certainly does not obviate the need to express gratitude. Given the sheer number of citations to Justice Dickinson’s special concurrence in *Fitch*, the author would be remiss in not thanking His Honor, and any anonymous clerks, associated with the production of the same. The author further wishes to commend these same persons for an opinion which was obviously well researched, and equally well reasoned and expressed.