

Winter 2003

## Hey, That's My Wife - The Tort of Alienation of Affection in Missouri - Thornburg v. Federal Express Corp.

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### Recommended Citation

Bruce V. Nguyen, *Hey, That's My Wife - The Tort of Alienation of Affection in Missouri - Thornburg v. Federal Express Corp.*, 68 MO. L. REV. (2003)

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# Hey, That's My Wife!—The Tort of Alienation of Affection in Missouri

*Thornburg v. Federal Express Corp.*<sup>1</sup>

## I. INTRODUCTION

The tort of alienation of affection was first recognized in New York in 1866<sup>2</sup> and was eventually adopted by almost every jurisdiction in the United States.<sup>3</sup> Missouri had recognized the tort as early as 1881<sup>4</sup> and continues to recognize it to this day. Most jurisdictions, however, have subsequently abolished the action either judicially or by statute.<sup>5</sup> This Note will first present the facts and holding of the instant case. It will then provide the legal background by briefly discussing the history of the tort of alienation of affection, the related tort of criminal conversation in Missouri, the tort as applied to the employer-employee setting, and the recent trend to abolish the common law action. Finally, this Note will argue that Missouri should follow the general trend and abolish the tort as well.

## II. FACTS AND HOLDING

Keith Thornburg (“Mr. Thornburg”) and Roberta Thornburg (“Ms. Thornburg”) had been married to each other since 1986.<sup>6</sup> In 1997, Ms. Thornburg began an affair with Wade Hunt (“Mr. Hunt”), her supervisor, while she was employed by Federal Express (“Fed Ex”).<sup>7</sup> After discovering the affair, Mr. Thornburg confronted Mr. Hunt.<sup>8</sup> Subsequently, Mr. Hunt terminated the relationship with Ms. Thornburg,<sup>9</sup> and in early 1998, the Thornburgs reconciled their marriage.<sup>10</sup>

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1. 62 S.W.3d 421 (Mo. Ct. App. 2001).

2. *See* *Hernance v. James*, 47 Barb. 120, 120 (N.Y. Gen. Term 1866); *see also* W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 124, at 918 (5th ed. 1984) [hereinafter *PROSSER & KEETON*].

3. *PROSSER & KEATON*, *supra* note 2, § 124, at 918. The only state that did not adopt the tort was Louisiana. *Id.*

4. *See* *Modisett v. McPike*, 74 Mo. 636, 636 (Mo. 1881).

5. *See infra* Part III.D for a brief discussion on the abolition of the tort of alienation of affection across the nation.

6. *Thornburg*, 62 S.W.3d at 424. The couple had two children during the course of their marriage. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

About the same time, an undisclosed number of Fed Ex employees “filed grievances concerning Mr. Hunt’s alleged sexual misconduct in the workplace and alleged unlawful discrimination resulting from his misconduct.”<sup>11</sup> A subsequent probe by Fed Ex exposed the relationship between Ms. Thornburg and Mr. Hunt.<sup>12</sup> Distressed by the situation, Ms. Thornburg “became unable to safely or efficiently perform her current job duties and . . . was placed on light-duty assignments.”<sup>13</sup>

After placing her on light-duty assignments, Fed Ex assisted Ms. Thornburg with her attempts to find new employment outside of the company<sup>14</sup> and later also offered Ms. Thornburg a transfer to a different office in Savannah, Georgia.<sup>15</sup> Ms. Thornburg wanted to accept the offer and discussed the situation with her husband,<sup>16</sup> but Mr. Thornburg refused to move and stated that if Ms. Thornburg decided to relocate to Georgia, it would end the marriage.<sup>17</sup> The ultimatum notwithstanding, Ms. Thornburg accepted the transfer offered by Fed Ex.<sup>18</sup> On May 6, 1998, Ms. Thornburg moved with her two children to Savannah, Georgia, while her husband was out of town.<sup>19</sup>

Upon arriving home from his trip, Mr. Thornburg discovered that his wife and children had moved out of the family’s house.<sup>20</sup> He visited the Fed Ex offices where his wife had been employed and requested information concerning his wife’s whereabouts.<sup>21</sup> Fed Ex refused to disclose any information to Mr. Thornburg.<sup>22</sup>

Consequently, Mr. Thornburg filed suit “in the Circuit Court of Cole County alleging three separate counts against the defendants including: 1) alienation of affection, 2) negligent infliction of emotional distress, and 3) intentional infliction of emotional distress.”<sup>23</sup> The defendants filed a motion to

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* Ms. Thornburg’s attempt to find alternate employment was encouraged by Fed Ex. *Id.* Ultimately, Ms. Thornburg was unable to find another job and remained with the company. *Id.*

15. *Id.* at 424-25.

16. *Id.* at 425.

17. *Id.* “Mr. Thornburg told Ms. Thornburg that her accepting the transfer would be a choice to abandon the marriage.” *Id.*

18. *Id.*

19. *Id.* Fed Ex assisted Ms. Thornburg in facilitating her move to Georgia. *Id.* The move occurred without Mr. Thornburg’s knowledge. *Id.*

20. *Id.*

21. *Id.* He “demanded to be told the new address and phone number of Ms. Thornburg in Savannah, Georgia.” *Id.*

22. *Id.*

23. *Id.*

dismiss Mr. Thornburg's claims.<sup>24</sup> The court granted the motion and dismissed the suit for failure to state a claim.<sup>25</sup> Mr. Thornburg subsequently appealed the trial court's ruling.<sup>26</sup>

The Missouri Court of Appeals for the Western District addressed each of Mr. Thornburg's causes of action and affirmed the trial court's ruling.<sup>27</sup> The court held that Fed Ex's actions did not amount to tortious conduct for which it could be held liable to Mr. Thornburg.<sup>28</sup>

### III. LEGAL BACKGROUND

#### A. A Brief History of the Tort of Alienation of Affection

The concept of permitting a husband to seek retribution from his wife's lover originated in the Teutonic tribes.<sup>29</sup> Their culture permitted the wronged husband to kill his wife's lover if he found the lover and his wife engaging in adulterous acts.<sup>30</sup> As time progressed, however, husbands were no longer able to take such extreme measures<sup>31</sup> but instead, could extract a financial penalty from the lover.<sup>32</sup> The theory was that the husband would use the payment as "means to purchase a new spouse."<sup>33</sup> Such penalties were not extracted to foster morality within the society; rather, the reason adultery was punished so severely in Teutonic culture was the importance of ensuring legitimate offspring.<sup>34</sup> In

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 426-29.

28. *Id.*

29. *See Hanover v. Ruch*, 809 S.W.2d 893, 894 (Tenn. 1991). The term "Teutons" is sometimes used generically to refer to Germanic peoples. 19 WORLD BOOK MILLENNIUM 183 (2000 ed.). The term is derived from one of the tribes that comprised the Germanic peoples. *Id.* The Teutons originally lived near the mouth of the Elbe River before migrating to Gaul (which primarily is modern-day France). *Id.* While settling in Gaul, the Teutons threatened Roman power during the second century B.C., and, ultimately, the Roman army defeated the tribe in 102 B.C. *Id.*

30. Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 654-55 (1930).

31. *Id.* at 655. The rise of Christianity may have played a role in the Teutonic tribe's abandonment of the notion that the husband could lawfully kill his wife's lover. *See id.*

32. *Id.* The amount of the penalty to be paid by the transgressor "depended upon the station in life of the husband." *Id.*

33. *Hoye v. Hoye*, 824 S.W.2d 422, 424 (Ky. 1992).

34. *Id.* "The husband's right to punish the lover or to be compensated by him was plainly derived from the importance of lawful issue of pure blood." Lippman, *supra* note

Teutonic society, property was inherited through the father, and, therefore, legitimacy was of the utmost importance.<sup>35</sup>

As successors to the Teutonic tradition, the Anglo-Saxons provided a cause of action for tortious interference with the marital relationship.<sup>36</sup> The basis for the cause of action was that the wife was a valuable servant for the husband.<sup>37</sup> Furthermore, the wife was considered to be the husband's property, the loss of which permitted the husband to seek compensation for damages.<sup>38</sup> Eventually, early English common law essentially created what are now known as the modern-day torts of criminal conversation and alienation of affection.<sup>39</sup>

In the United States, New York became the first state to recognize the tort of alienation of affection.<sup>40</sup> Ultimately, almost every state eventually adopted the tort at common law.<sup>41</sup> It has been traditionally held that there are certain rights and obligations inherent in the marital relationship.<sup>42</sup> The term "consortium" is often used to describe the inherent rights and obligations flowing from one spouse to the other.<sup>43</sup> These rights include "the affections, society, and companionship of the other spouse, sexual relations and the exclusive enjoyment of them, service in the home[,] and support."<sup>44</sup> Interference with these rights was

30, at 655. "It is not likely that adultery was frowned upon for moral reasons, but because of the importance of pedigree." *Id.*

35. *Hoye*, 824 S.W.2d at 423-24.

36. *Id.* at 424.

37. *Id.* "The wife was considered the husband's servant, and anyone who interfered with the right of a master to the services of his servant was liable to him in damages." Lippman, *supra* note 30, at 655-56.

38. *Hoye*, 824 S.W.2d at 424.

39. *Hanover v. Ruch*, 809 S.W.2d 893, 894 (Tenn. 1991). "Enticement . . . has evolved into what is commonly known today as the tort of alienation of affections." *Id.* "[S]eduction . . . today is commonly known as the tort of criminal conversation." *Id.* Criminal conversation is "[a] tort action for adultery." BLACK'S LAW DICTIONARY 380 (7th ed. 1999). Alienation of affection is "[a] tort claim for willful or malicious interference with a marriage by a third party." BLACK'S LAW DICTIONARY 73 (7th ed. 1999).

40. *See Hermance v. James*, 47 Barb. 120, 120 (N.Y. Gen. Term. 1866); *see also* PROSSER & KEETON, *supra* note 2, § 124, at 918.

41. PROSSER & KEETON, *supra* note 2, § 124, at 918. The only state that did not adopt the tort was Louisiana. *Id.* Surprisingly, England has never recognized the tort of alienation of affection. *Id.* § 124, at 930.

42. *See generally* HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 11.1, at 382-84 (2d student ed. 1988).

43. RESTATEMENT (SECOND) OF TORTS § 683 cmt. c (1977).

44. *Id.* Originally, the injury resulting from the loss of consortium was the loss of the services owed by a servant to the master. *See* Lippman, *supra* note 30, at 662. The basis for permitting the husband to sue for the loss of consortium is predicated on the notion that the wife is a servant of the husband. Lippman, *supra* note 30, at 653, 655-56.

“viewed as depriving the marriage relationship of the conjugal relationship of husband and wife.”<sup>45</sup> Consequently, the tort of alienation of affection was widely adopted to vindicate a spouse’s rights in the other spouse.<sup>46</sup>

*B. The Related Tort of Criminal Conversation in Missouri*<sup>47</sup>

The Missouri Supreme Court abolished the tort of criminal conversation by judicial decree in 1994.<sup>48</sup> Although the court noted that state courts in Missouri have traditionally recognized the tort as a viable cause of action,<sup>49</sup> the court also noted that numerous jurisdictions throughout the country had already abolished the tort of criminal conversation.<sup>50</sup> Ultimately, the Missouri Supreme Court declared that it had “the authority to abolish common law torts”<sup>51</sup> and abolished the tort of criminal conversation.

The court listed two possible reasons why the tort of criminal conversation came into existence.<sup>52</sup> The court stated that the tort enabled aggrieved spouses to seek compensation for injuries caused by the defendant.<sup>53</sup> The court also stated that the tort functioned to punish and deter adulterous conduct.<sup>54</sup> The court concluded, however, that the rationale for permitting aggrieved spouses to state a claim for criminal conversation no longer existed.<sup>55</sup> To begin with, other

45. Marshall L. Davidson, III, Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629, 630 (1989).

46. *See id.* at 632. “The primary aim of the tort was to punish the willful and malicious interference with those legally protected marital interests that each spouse is regarded to have in the other.” *Id.*

47. Criminal conversation and alienation of affection both involve tortious interference with the marital relationship. PROSSER & KEETON, *supra* note 2, § 124, at 917-18. Typically, these two actions are alleged concurrently. *See id.* There is case law stating that criminal conversation and alienation of affection “is but one tort which may be accomplished by different means.” *Id.* § 124, at 919; *see also* Skaggs v. Stanton, 532 S.W.2d 442, 443 (Ky. 1976) (“We have reached the conclusion that the time has come to raise the curtains of confusion and hold that the tort is interference with the marriage relation and that criminal conversation . . . and alienation of affections are no more than methods by which this tort may be committed.”).

48. *Thomas v. Siddiqui*, 869 S.W.2d 740, 742 (Mo. 1994) (“This court now abolishes the tort of criminal conversation in Missouri.”).

49. *Id.* at 741.

50. *Id.*

51. *Id.* “With the disappearance of the reason the thing disappears; when the reason for a rule of law fails, the rule fails.” *Id.* (quoting *State ex inf. Norman v. Ellis*, 28 S.W.2d 363, 369 (Mo. 1930)).

52. *See id.* at 741-42.

53. *Id.* at 741.

54. *Id.* at 742.

55. *Id.* at 741-42.

remedies existed that would fulfill the tort's original purpose of compensating the aggrieved spouse.<sup>56</sup> The court noted, for instance, that adultery is a factor to consider in a judicial proceeding for marital dissolution and subsequent division of property.<sup>57</sup> Also, the tort of alienation of affection has afforded plaintiffs an alternate cause of action.<sup>58</sup> Finally, the state no longer pursues the retributive objective of the tort of criminal conversation.<sup>59</sup> The court noted that adultery had been punished under the criminal statute until the state repealed the provision in 1979.<sup>60</sup> Since criminal conversation is the civil equivalent of the crime of adultery, the court held that the repeal of the adultery statute evidenced a legislative intent to no longer punish adulterous actions either by the criminal justice system or through civil actions.<sup>61</sup>

### *C. The Tort of Alienation of Affection as Applied to Employers*

*Jackson v. Righter*<sup>62</sup> is one of the leading cases considering an alienation of affection claim involving the vicarious liability of an employer. Ms. Jackson, the plaintiff's ex-wife, worked for Novell, Inc., as a secretary.<sup>63</sup> Ms. Jackson's supervisor promoted her, authorized unworked overtime hours as an unofficial raise, provided substantial bonuses, and gave Ms. Jackson gifts.<sup>64</sup> Their relationship became more personal, and eventually Ms. Jackson began accompanying her supervisor on business trips.<sup>65</sup> Ms. Jackson terminated her affair with her supervisor after a few months, however, and began an affair with a co-worker.<sup>66</sup> Mr. Jackson later discovered his wife's affairs with both men and the Jacksions attempted to reconcile without success.<sup>67</sup> Consequently, the Jacksions divorced.<sup>68</sup> Mr. Jackson sued the two employees and Novell.<sup>69</sup> His claim against Novell was based on vicarious liability for the tortious actions of the two employees and for negligent supervision and retention of these

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56. *Id.* at 741.

57. *Id.*

58. *Id.*

59. *Id.* at 742.

60. *Id.* at 741.

61. *Id.*

62. 891 P.2d 1387 (Utah 1995).

63. *Id.* at 1389.

64. *Id.* at 1389-90.

65. *Id.* at 1390.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

employees.<sup>70</sup> The Utah Supreme Court noted that “[a]n employer may be vicariously liable under the doctrine of respondeat superior for the harmful actions of an employee if those actions are committed within the scope of the employee’s employment.”<sup>71</sup> The court went on to state, however, that some actions are “so clearly outside the scope of employment that reasonable minds cannot differ.”<sup>72</sup> In this case, the court held that the employee’s conduct was clearly outside the scope of employment, thus abrogating any liability that could be incurred by Novell through vicarious liability.<sup>73</sup>

The Utah Supreme Court also addressed the husband’s claims for negligent supervision and retention.<sup>74</sup> The court refused to grant relief to the plaintiff on these claims as well because there was no showing that the employer owed any duty to the husband.<sup>75</sup> The court stated that “a duty may arise when an employer could reasonably be expected, consistent with the practical realities of an employer-employee relationship, to appreciate the threat to a plaintiff of its employee’s actions and to act to minimize or protect against that threat.”<sup>76</sup> The court then held that there was no indication the employer had any knowledge or could be reasonably expected to have knowledge of the personal relationship between Ms. Jackson and any of its employees.<sup>77</sup>

The Utah Supreme Court also noted that there were policy reasons not to extend liability to employers in such situations.<sup>78</sup> The court held that it would be unreasonable to require employers to ascertain the marital status of their employees.<sup>79</sup> Furthermore, employers should not have a duty to monitor their employees to the extent necessary to discover any personal relationships between two employees, especially because the relationship would likely occur outside the scope of employment and would in some cases be impossible to discover at all.<sup>80</sup> Finally, the court found it persuasive that such an inquiry would effectually

70. *Id.*

71. *Id.* at 1391. To be within the scope of employment, the conduct must be of the general nature the employee is employed to perform, it must occur during the employee’s work schedule, and the conduct must serve the employer’s interests. *Id.*

72. *Id.* In such situations, the matter can be decided by summary judgment. *Id.*

73. *Id.* at 1391-92. The Utah Supreme Court held that the employee’s actions were not of the general nature for which he was employed. *Id.* Furthermore, the employee was not motivated by any of the employer’s interests when he allegedly acted to alienate the wife’s affection. *Id.*

74. *Id.* at 1392-94.

75. *Id.*

76. *Id.* at 1392.

77. *Id.* Furthermore, the fact that an employer may be aware of such personal relationships is insufficient to impute liability upon the employer. *Id.*

78. *Id.* at 1393-94.

79. *Id.*

80. *Id.*

expose the employer to liability for interfering with the personal relationship of its employees.<sup>81</sup>

#### *D. Abolition of the Tort of Alienation of Affection Across the Nation*

Over the course of the second half of the twentieth century, most states have eliminated the tort of alienation of affection.<sup>82</sup> Thirty-four states, as well as the District of Columbia, have abolished the common law tort through legislative action.<sup>83</sup> Illinois has statutorily limited the remedy for a violation of the tort.<sup>84</sup> In some states, the public policy against bringing an action for alienation of affection is considered so strong that those states have enacted statutes that criminally punish filing such lawsuits.<sup>85</sup>

Additionally, four states have eliminated the alienation of affection cause of action by judicial decree.<sup>86</sup> More than twenty years ago, Washington became

81. *Id.*

82. PROSSER & KEETON, *supra* note 2, § 124, at 930.

83. See ALA. CODE § 6-5-331 (1993); ARIZ. REV. STAT. § 25-341 (2000); ARK. CODE ANN. § 16-118-106 (Michie Supp. 2001); CAL. CIV. CODE § 43.5 (West 1982); COLO. REV. STAT. § 13-20-202 (2000); CONN. GEN. STAT. ANN. § 52-572b (West 1991); DEL. CODE ANN. tit. 10, § 3924 (1999); D.C. CODE ANN. § 16-923 (2001); FLA. STAT. ch. 771.01 (2000); GA. CODE ANN. § 51-1-17 (2000); IND. CODE § 34-12-2-1 (1998); KAN. STAT. ANN. § 23-208 (1995); ME. REV. STAT. ANN. tit. 14, § 301 (West Supp. 2001); MD. CODE ANN., FAM. LAW § 3-103 (1999); MASS. GEN. LAWS ANN. ch. 207, § 47b (West 2001); MICH. COMP. LAWS § 600.2901 (2000); MINN. STAT. § 553.02 (2000); MONT. CODE ANN. § 27-1-601 (2001); NEB. REV. STAT. § 25-21,188 (1995); NEV. REV. STAT. 41.380 (2001); N.J. STAT. ANN. § 2A:23-1 (West 2000); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1992); N.D. CENT. CODE § 14-02-06 (1997); OHIO REV. CODE ANN. § 2305.29 (Anderson 2001); OKLA. STAT. tit. 76, § 8.1 (2002); OR. REV. STAT. § 30.840 (2001); 23 PA. CONS. STAT. § 1901 (West 2001); R.I. GEN. LAWS § 9-1-42 (1997); TENN. CODE ANN. § 36-3-701 (2001); TEX. FAM. CODE ANN. § 1.107 (Vernon 1998); VT. STAT. ANN. tit. 15, § 1001 (1989); VA. CODE ANN. § 8.01-220 (Michie 2000); W. VA. CODE ANN. § 56-3-2a (Michie 1997); WIS. STAT. ANN. § 768.01 (West 2001); WYO. STAT. ANN. § 1-23-101 (Michie 2001); see also 54 AM. JUR. PROOF OF FACTS 3D *Proof of Alienation of Affections* § 5 (1999).

84. See 740 ILL. COMP. STAT. 5/1-2 (2002).

85. RESTATEMENT (SECOND) OF TORTS § 683 cmt. b (1977).

86. See *O'Neil v. Schuckardt*, 733 P.2d 693, 698 (Idaho 1986) ("Since the many ill effects of the suit for alienation of affections outweigh any benefit it may have, we . . . abolish the cause of action in Idaho."); *Fundermann v. Mickelson*, 304 N.W.2d 790, 791 (Iowa 1981) ("We have become convinced that there is inherent and fatal contradiction in the term 'alienation of affections.' The alienation belies the affection. Suits for alienation are useless as a means of preserving a family. They demean the parties and the courts. We abolish such a right of recovery."); *Hoye v. Hoye*, 824 S.W.2d 422, 427 (Ky. 1992) ("[W]e thus hold that the action for intentional interference with the marital relation is abolished."); *Wyman v. Wallace*, 615 P.2d 452, 455 (Wash. 1980)

the first state to abolish the tort.<sup>87</sup> The Washington Supreme Court based its holding on the findings of the appellate court that the tort failed to preserve marriages, the court system could not effectively police out-of-court settlements, the tort promoted blackmail, no standards for assessing damages existed, and successful prosecution of the suit amounted to little more than the sale of the spouse's affections.<sup>88</sup>

The Iowa Supreme Court held that the tort failed to preserve the family unit.<sup>89</sup> Furthermore, the court noted that fair results are difficult to obtain in such suits due to sympathy toward the plaintiff.<sup>90</sup> Also, the court dismissed the notion that any party could recover for the loss of affection from the other spouse.<sup>91</sup>

The Idaho Supreme Court, noting that both Washington and Iowa had previously abolished the cause of action judicially, also declared that alienation of affection would no longer be recognized in the state.<sup>92</sup> The holding echoed the Washington and Iowa decisions. The court stated that the tort failed to protect the marital relationship between two spouses.<sup>93</sup> Instead, the existence of the tort merely provided a means whereby one spouse could seek revenge against the defendant.<sup>94</sup> The court also noted that juries face several problems when serving at a trial for alienation of affection.<sup>95</sup> First, it is difficult to determine whether the alienated spouse, and not the defendant, was actually responsible for the alienation.<sup>96</sup> Second, juries are "often unduly sympathetic to the plaintiff."<sup>97</sup> Finally, the damages in such suits are difficult to ascertain, "making it easier for verdicts to be tainted by passion and prejudice."<sup>98</sup>

The most recent state to judicially abolish the tort of alienation of affection, Kentucky, has also followed many of the same rationales used by the other states to justify its holding to no longer recognize the tort.<sup>99</sup> The court recognized that

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("We . . . call for the abolition of the action for alienation of a spouse's affections.")

87. See *Wyman*, 615 P.2d at 455.

88. *Id.*; see also *Wyman v. Wallace*, 549 P.2d 71, 72-74 (Wash. Ct. App. 1976), *aff'd*, 615 P.2d 452 (Wash. 1980).

89. *Funderman*, 304 N.W.2d at 791.

90. *Id.* "It is illogical to pretend that juries can dispassionately resolve the factual disputes in alienation suits in the same manner as in other cases." *Id.*

91. *Id.* at 794. "[P]laintiffs in such suits do not deserve to recover for the loss of or injury to 'property' which they do not, and cannot, own." *Id.*

92. *O'Neil v. Schuckardt*, 733 P.2d 693, 698 (Idaho 1986).

93. *Id.* "Never has there been any documentation that the existence of the action actually protects marriages." *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Hoye v. Hoye*, 824 S.W.2d 422, 424-27.

the tort was based on the outdated notion that the wife is property of the husband<sup>100</sup> and that the tort exists today as a means to protect marriages from intrusion by a third party.<sup>101</sup> The court cited previous decisions that abolished the tort, stating that lawsuits for alienation of affection “invite abuse.”<sup>102</sup> Also, the suit ultimately harms the family unit, since “children [may be required] to testify to details of the family relationship in open court.”<sup>103</sup>

#### IV. INSTANT DECISION

In *Thornburg v. Federal Express Corp.*,<sup>104</sup> the Missouri Court of Appeals for the Western District addressed the trial court’s holding that Mr. Thornburg failed to state a claim for alienation of affection.<sup>105</sup> The court noted that “a plaintiff must allege that 1) the defendant engaged in wrongful conduct, 2) the plaintiff lost the affections or consortium of his or her spouse; and 3) there was a causal connection between the defendant’s conduct and the plaintiff’s loss.”<sup>106</sup>

Furthermore, the appellate court held that only those actions that have the natural and probable consequences of alienating the affections of a spouse are sufficient to impose liability on the defendant for alienation of affection.<sup>107</sup> The court then went on to find that Fed Ex’s actions did not have the natural and probable consequence of alienating the affections of Ms. Thornburg.<sup>108</sup> Instead, the court concluded, Fed Ex’s conduct was directed toward providing Ms. Thornburg with an opportunity to transfer to another Fed Ex branch location.<sup>109</sup>

The appellate court noted that Fed Ex’s offer did not require Ms. Thornburg to leave her husband and terminate the marital relationship that existed between

100. *Id.*

101. *Id.* at 425.

102. *Id.* at 427. Plaintiffs are often able to extract generous settlements by threatening to bring the defendant’s reputation into question. *Id.* Such settlements amount to legally sanctioned blackmail. *See id.*

103. *Id.* (quoting *O’Neil*, 733 P.2d at 698).

104. 62 S.W.3d 421 (Mo. Ct. App. 2001).

105. *Id.* at 425-27. This Note is primarily concerned with the tort of alienation of affection and will not address the other torts alleged in Mr. Thornburg’s complaint. It should be noted that the Missouri Court of Appeals for the Western District also addressed Mr. Thornburg’s claims for negligent and intentional infliction of emotional distress and affirmed the trial court’s ruling dismissing Mr. Thornburg’s suit on those grounds as well. *See id.* at 427-29.

106. *Id.* at 426.

107. *Id.* at 426-27.

108. *Id.* at 426.

109. *Id.* Fed Ex’s transfer offer was made to Ms. Thornburg in light of the stress experienced by Ms. Thornburg as the result of her affair with Mr. Hunt. *Id.*

them,<sup>110</sup> nor would Ms. Thornburg lose her job at Fed Ex had she chosen not to accept the transfer opportunity.<sup>111</sup> Furthermore, the court noted that when Ms. Thornburg moved to Georgia to pursue the employment opportunity offered by Fed Ex, Mr. Thornburg could have moved with her or could have chosen to maintain a long distance relationship.<sup>112</sup>

Consequently, Fed Ex's action did not have the natural and probable consequence of alienating Ms. Thornburg's affections and could not be deemed wrongful at law.<sup>113</sup> Accordingly, the Missouri Court of Appeals for the Western District affirmed the trial court's dismissal of Mr. Thornburg's claim for alienation of affection.<sup>114</sup>

## V. COMMENT

The situation in *Thornburg* is atypical. In a typical case a spouse would bring a claim directly against his spouse's lover, but in *Thornburg*, Mr. Thornburg filed an action for alienation of affection against Fed Ex, his wife's employer, rather than Mr. Hunt, his wife's supervisor and one-time lover.<sup>115</sup> Even in cases where the alienated spouse does sue his spouse's employer, the spouse is usually making an alienation of affection claim based on vicarious liability, thus arguing that the employer should be held liable for the actions of one of its employees.<sup>116</sup>

In the present case, Mr. Thornburg was not basing his case on the theory of respondeat superior. Rather, he sought compensation for damages resulting from Fed Ex's conduct in relocating Ms. Thornburg to Georgia.<sup>117</sup> Ultimately, the

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 426-27.

114. *Id.* at 427.

115. *Id.* at 424.

116. *See, e.g.,* Hargan v. S.W. Elec. Coop., Inc., 725 N.E.2d 807 (Ill. App. Ct. 2000) (husband sued ex-wife's employer and president of the employer's board of directors); Mercier v. Daniels, 533 S.E.2d 877 (N.C. Ct. App. 2000) (husband sued moving van supplier and its employee for actions of the employee causing the alienation of his wife's affections); Veeder v. Kennedy, 589 N.W.2d 610 (S.D. 1999) (husband sued employer for alienation of affection based on a sexual relationship between his wife and an employee of the company); Helena Labs. Corp. v. Snyder, 886 S.W.2d 767 (Tex. 1994) (spouses of two employees sued the employer based on an affair between the two employees).

117. *Thornburg*, 62 S.W.3d at 429. The court did, however, address the doctrine of respondeat superior in the context of alienation of affection claims. *Id.* The appellate court noted that the trial court found that a business cannot be vicariously liable for an affair between one of its employees and another person because such conduct is not

court dismissed Mr. Thornburg's claims, holding that Fed Ex's actions did not have the natural and probable consequence of alienating Ms. Thornburg's affection from Mr. Thornburg.<sup>118</sup>

The result reached by the Missouri Court of Appeals for the Western District is not difficult to understand. It seems absurd for Mr. Thornburg to blame Fed Ex for any marital difficulties he and his wife were experiencing. A contrary decision could lead to numerous lawsuits against employers where the only allegedly wrongful act was to provide one spouse with a career advancement opportunity or a relocation assignment. Furthermore, the concept of the tort is completely anachronistic in today's modern setting.<sup>119</sup> For these reasons, alienation of affection in Missouri should be abolished with respect to all parties.

### *A. The Original Purposes of Creating the Tort of Alienation of Affection*

One of the original purposes of creating the tort of alienation of affection was to ensure legitimate offspring and pure bloodlines.<sup>120</sup> The necessity of maintaining pedigree was important to early Germanic tribes because property was inherited through the father.<sup>121</sup> This rationale for allowing the tort of alienation of affection, however, no longer exists today. Legitimacy of children, although still important today to some extent, does not carry the same significance it once held. Furthermore, there are more reliable means of ensuring the legitimacy of children if one deems it important enough to do so. The accuracy of paternity tests has all but eliminated the need to maintain the tort as a means of ensuring legitimate children and pure bloodlines.

The other original purpose of creating the tort of alienation of affection was to protect a man's property interest in his wife.<sup>122</sup> This rationale can hardly be cited as an acceptable reason for maintaining the tort today. Women are no longer treated as the property of their husbands, nor are they considered to be inferior to their husbands in the eyes of the law. As strides toward equality between men and women have been made,<sup>123</sup> women now also possess the right

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within the scope of the employee's employment. *Id.* Furthermore, the court noted that an employer can only be held liable for actions taken by its employees if such actions constitute a tort. *Id.* Mr. Thornburg failed to allege any such tort on the part of Mr. Hunt. *Id.*

118. *Id.* at 426-27.

119. See generally Thomas K. Leeper, Comment, *Alienation of Affections: Flourishing Anachronism*, 13 WAKE FOREST L. REV. 585 (1977).

120. See *supra* notes 34-35 and accompanying text.

121. See *supra* note 35 and accompanying text.

122. See *supra* notes 37-38 and accompanying text.

123. The Married Women's Property Acts "granted wives the right to own property and to sue in their own names to recover damages for their own personal injuries." Hoye

to bring a lawsuit against tortious wrongdoers whose actions have caused the wife to lose the affections of her husband.<sup>124</sup> Even so, the notion that a person possesses a property interest in his or her spouse and the affections of that spouse is an anachronism.<sup>125</sup>

### B. Protection of Marriages

The most commonly cited rationale for maintaining the tort of alienation of affection today is to protect the institution of marriage.<sup>126</sup> There are several reasons, however, why the tort of alienation of affection fails to promote this laudable goal<sup>127</sup> and why, in reality, bringing an action in tort for alienation of affection may have a contrary result.<sup>128</sup> First, a spouse who does file a suit will essentially be publicly acknowledging that the marriage has turned sour.<sup>129</sup> This in itself is probably not harmful to the marital relationship, but the unwanted publicity places undue stress on the marriage.<sup>130</sup> In actuality, the resulting stress is more likely to harm the marriage than to preserve the relationship—such publicity for what amounts to a personal action is unlikely to strengthen the marital bond between the married parties and, thereby, will frustrate the purpose of the tort in the first place.<sup>131</sup>

v. Hoye, 824 S.W.2d 422, 424 (Ky. 1992) (quoting Leeper, *supra* note 119, at 588) (internal quotation marks omitted).

124. Thornburg v. Fed. Express Corp., 62 S.W.3d 421, 424 (Mo. Ct. App. 2001).

125. PROSSER & KEETON, *supra* note 2, § 124, at 916 (“The 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.”).

126. Gregory L. Thompson, Note, *The Suit of Alienation of Affections: Can Its Existence Be Justified Today?*, 56 N.D. L. REV. 239, 250 (1980). The state has an interest in stabilizing familial relationships, which can be accomplished through preserving marriages. *Id.* “The action [of alienation of affection] has survived in the hope that it affords protection to family relationships.” *Fundermann v. Mickelson*, 304 N.W.2d 790, 791 (Iowa 1981).

127. Thompson, *supra* note 126, at 250-52. *Fundermann*, 304 N.W.2d at 791 (“[The] lofty hope [of protecting the family through the continued existence of the tort of alienation of affection] has proven illusory.”); Leeper, *supra* note 119, at 601 (“It is . . . misleading and futile to suppose that the threat of a damage suit can protect the marital relationship.”) (quoting CLARK, *supra* note 42, § 10.2, at 267); *Wyman v. Wallace*, 549 P.2d 71, 74 (Wash. Ct. App. 1976), *aff’d*, 615 P.2d 452 (Wash. 1980) (“[T]he action does not prevent human misconduct itself. In our judgment, the interests which the action seeks to protect are not protected by its existence, and the harm it engenders far outweighs any reasons for its continuance.”).

128. Thompson, *supra* note 126, at 251.

129. Thompson, *supra* note 126, at 251.

130. Thompson, *supra* note 126, at 251.

131. Thompson, *supra* note 126, at 251. Often, facts will be exposed during trial

Additionally, the action itself is normally brought after the marriage has already dissolved and can no longer be preserved.<sup>132</sup> Typically, revenge, not the desire to be compensated for the loss of a spouse's affections, is the main motivation for bringing a suit for alienation of affection.<sup>133</sup> In fact, this reason is very often cited as the reason most jurisdictions have abolished the tort of alienation of affection.<sup>134</sup> The thinking is that the tort fails to preserve marriages. Rather, it "foster[s] bitterness and promote[s] vexatious lawsuits as well as blackmail and extortion."<sup>135</sup> Ultimately, the only result of a successful suit for an alienation of affection claim is the plaintiff's "sale of his or her spouse's affections."<sup>136</sup>

Also, the rationale that maintaining the tort of alienation of affection will preserve marital relationships seems absurd in light of the divorce rate in the United States.<sup>137</sup> Although the tort of alienation of affection does not require a sexual relationship between the defendant and the plaintiff's spouse,<sup>138</sup> the typical scenario does in fact involve an adulterous relationship.<sup>139</sup> The continued existence of the tort of alienation of affection apparently had little deterrent effect on the sexual conduct of Americans,<sup>140</sup> especially when one considers that "an

that will harm or destroy the reputation of one, or both, spouses. *Id.*

132. See Thompson, *supra* note 126, at 251.

133. See Thompson, *supra* note 126, at 251.

134. *Proof of Alienation of Affections*, *supra* note 83, § 6.

135. *Proof of Alienation of Affections*, *supra* note 83, § 6; see also 740 ILL. COMP. STAT. 5/1 (1993):

[T]he action for alienation of affections has been subjected to grave abuses and has been used as an instrument for blackmail by unscrupulous persons for their unjust enrichment, due to the indefiniteness of the damages recoverable . . . and the consequent fear of persons threatened with such actions that exorbitant damages might be assessed against them.

136. *Proof of Alienation of Affections*, *supra* note 83, § 6 (internal quotation marks omitted). "[T]he action actually hurt marriages in that it gave the plaintiff an incentive to drag the marital relationship through court resulting in what amounted to a forced sale of affections." *O'Neil v. Schuckardt*, 733 P.2d 693, 697 (1986).

137. Phyllis Coleman, *Who's Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 IND. L. REV. 399, 409 (1991) (arguing that adultery laws should be repealed for lack of any deterrent effect).

138. The elements of alienation of affection include only: (1) a wrongful act by the defendant; (2) the loss of affections or consortium; (3) and a causal connection between the wrongful act and the loss suffered. *Thornburg v. Fed. Express Corp.*, 62 S.W.3d 421, 426 (Mo. Ct. App. 2001). *Proof of Alienation of Affections*, *supra* note 83, § 16 ("[A] cause of action for alienation of affection does not require that the defendant has committed adultery with the plaintiff's spouse.").

139. Leeper, *supra* note 119, at 601.

140. See *Fundermann v. Mickelson*, 304 N.W.2d 790, 791 (Iowa 1981).

estimated sixty percent of American adults have extramarital affairs.”<sup>141</sup> Furthermore, every extramarital affair would have the potential of turning into a lawsuit for alienation of affection. If these cases were brought more often, the courts in this country would face a significant number of alienation of affection claims that could clog the entire judicial system.

If the goal of maintaining the tort of alienation of affection is to preserve marriages, then the question must be asked why we then allow divorce to exist at all. The answer is likely that every person has a fundamental right to marry<sup>142</sup> and if a person chooses to no longer remained married to his or her spouse, the state should not interfere with that person’s individual choice. Because an individual’s right is so important, the rationale for permitting divorce should also apply to eliminating the tort of alienation of affection. The continued existence of the tort of alienation of affection does little more than infringe on an individual’s right to make decisions concerning any personal relationship in which he or she may become involved.<sup>143</sup>

Furthermore, the fact that Missouri has abolished the related tort of criminal conversation<sup>144</sup> tends to support the fact that the state may not have as strong an interest in preserving the marital relationship between two married persons. An action for criminal conversation requires a sexual relationship between the defendant and the plaintiff’s spouse.<sup>145</sup> Arguably, the tort of criminal conversation involves more wrongful conduct—because it necessarily involves a sexual relationship—than an action for alienation of affection, which theoretically can merely involve the defendant counseling the plaintiff’s spouse to leave the plaintiff. Still, if the Missouri Supreme Court has held that criminal conversation should no longer be a viable tort in Missouri,<sup>146</sup> then there is little rationale for allowing plaintiffs to bring an action for alienation of affection either.<sup>147</sup>

### *C. Right to Compensation for Intrusion into the Marital Relationship*

The injury suffered by an aggrieved spouse in an action for alienation of affection is the loss of the other spouse’s consortium and possibly mental pain

141. Coleman, *supra* note 137, at 409.

142. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (“[T]he right to marry is of fundamental importance.”).

143. *See* Thompson, *supra* note 126, at 254.

144. *See supra* Part III.B for a discussion of the abolition of the tort of criminal conversation in Missouri.

145. *Proof of Alienation of Affections*, *supra* note 83, at § 4.

146. *Thomas v. Siddiqui*, 869 S.W.2d 740, 742 (Mo. 1994).

147. *Id.* (Price, J., concurring) (“Many of the reasons that support abolishing the tort of criminal conversation also apply to alienation of affection.”).

and suffering resulting from the subsequent marital discord.<sup>148</sup> Obviously, it can no longer be reasonably argued that either spouse has a property interest in the affections or services of the other spouse.<sup>149</sup> A spouse may have an interest in maintaining the marital relation, but this right is not absolute—an individual has a right to make decisions concerning any personal relationship in which he or she may become involved.<sup>150</sup> Consequently, a person has an interest in the affections and services of his or her spouse only so long as that spouse voluntarily provides them. The spouse cannot be compelled to provide affection without abridging his or her individual rights. Furthermore, a third party should not be penalized when he or she is the recipient of affection that is voluntarily given. The imposition of such liability is almost equivalent to reinstating the rationale that individuals possess a property interest in the affections of their spouses.

## VI. CONCLUSION

The justifications for maintaining the tort of alienation of affection either no longer exist today or are not actually promoted by the continued existence of the tort. Furthermore, the tort is subject to abuse and may result in more harm being done to the marital relationship than any good that may occur because of it. The tort is a relic of a bygone era and serves only to perpetuate the notion that a person may have a property interest in his or her spouse. Although the *Thornburg* case is correctly decided, judicial resources, as well as significant monetary expenses, were spent in litigating a suit with little merit. Missouri, therefore, should follow the national trend in abolishing the action.

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148. Thompson, *supra* note 126, at 252.

149. *See supra* notes 37-38, 122-25 and accompanying text.

150. *See supra* text accompanying note 143.