

**DAVIS V. DAVIS:
THE DISCOVERY RULE DOES NOT APPLY
TO THE STATUTE OF LIMITATIONS FOR
ALIENATION OF AFFECTION**

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*Davis v. Davis*¹ presented a notable development in case law regarding Mississippi's common law tort of alienation of affection: adopting the rationale in *Fulkerson v. Odom*, the Mississippi Supreme Court ruled that the discovery rule does not apply to alienation of affection claims.

In 1979, John and Sandra Davis married and had two children, Jared in 1987 and Becky in 1989.² Although John believed that the two had a happy marriage in the 1980s, Sandra, on the contrary, thought that the marriage between the two "was never good."³ In the late 1980s, Sandra began an affair with Porter Horgan, during which the two sporadically engaged in unprotected sex.⁴ John believed that during this time, the marriage was good and he had no suspicions of an affair.⁵ In 1999, John and Sandra separated, later divorcing in 2001.⁶ After learning in 2018 that Jared and Becky were not his biological children,⁷ John confronted

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¹ 360 So. 3d 196, 198 (Miss. 2023).

² *Id.* at 198 (Miss. 2023).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 199.

⁶ *Id.* (providing background that John testified at trial that he was unaware of Sandra's affair during their marriage, that he never had suspicions thereof, and claimed he was "shocked" when Sandra chose to leave the marital home).

⁷ *Id.*

Sandra, during which Sandra admitted that she realized the children physically resembled Horgan.⁸

John filed a complaint against Sandra and Horgan in Pike County Circuit Court, alleging fraud against Sandra and alienation of affection against Horgan.⁹ Sandra and Horgan moved to dismiss the complaint, but the trial court denied the motion. At trial, the jury found for John, awarding him \$700,000 in damages for alienation of affection.¹⁰ Sandra and Horgan appealed to the Mississippi Supreme Court.¹¹ The Court reversed the circuit court's opinion, holding that the statute of limitations barred the alienation of affection claim and that John failed to request any instruction on damages for any other claim.¹²

In *Fitch v. Valentine*, the Mississippi Supreme Court upheld alienation of affection as “the only available avenue to provide redress for a spouse who has suffered loss and injury to his or her marital relationship against [a] third party.”¹³ According to *Saunders v. Alford*, the plaintiff must prove three elements: “(1) wrongful conduct of the defendant; (2) loss of affection or consortium; and (3) causal connection between such conduct and loss.”¹⁴ In *Overstreet v. Merlos*, the Court declared that the claim accrues “when the alienation or loss of affection is finally accomplished,”¹⁵ which, as noted in *Carr v. Carr*, begins a three-year statute of limitations, pursuant to Mississippi Code Section 15-1-49.¹⁶

Section 15-1-49(2) introduced the discovery rule, which provides that in actions “which involve latent injury or disease, the

⁸ *Davis*, 360 So. 3d at 198-99.

⁹ *Id.* at 199. John also alleged that Sandra and Horgan were jointly and severally liable for fraud, alienation of affection, intentional infliction of emotional distress (IIED), and outrageous conduct. *Id.*

¹⁰ *Davis*, 360 So. 3d, at 200.

¹¹ *Id.*

¹² John originally submitted instruction P-9, allowing the jury to determine damages for fraud and IIED, but later withdrew P-9 after Sandra and Horgan objected. *Id.* John offered no substitute instruction, leaving alienation of affection as the only claim for which damages could be awarded at trial. *Id.* at 200, 202.

¹³ *Fitch v. Valentine*, 959 So. 2d 1012, 1020 (Miss. 2007). In *Fitch v. Valentine*, the Court heard a public policy argument to abolish the tort of alienation of affection, which was recognized in Mississippi common law as early as 1926. *Id.* at 1018.

¹⁴ *Saunders v. Alford*, 607 So. 2d 1214, 1215 (Miss. 1992).

¹⁵ *Overstreet v. Merlos*, 570 So. 2d 1196, 1198 (Miss. 1990).

¹⁶ *Carr v. Carr*, 784 So. 2d 227, 230 (Miss. Ct. App. 2000).

cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.”¹⁷ In *Fulkerson v. Odom*, the Court of Appeals held that the discovery rule does not apply to alienation of affection claims, reasoning that “[a]lthough a clandestine affair is a secretive wrongdoing, it is not unrealistic to expect a plaintiff to perceive, at the time of the affair, the resulting harm—the loss of consortium through alienation of the spouse’s affection.”¹⁸ The *Fulkerson* court added, “[b]ecause the injury is the detrimental change in the marriage relationship, it is reasonable for a spouse to discover the change in the marriage as it occurs,”¹⁹ and as such, a spouse must “exercise reasonable diligence concerning the state of his marriage.”²⁰

In overturning the trial court’s judgment, the majority in *Davis* adopted the rationale in *Fulkerson* to dismiss John’s argument that the discovery rule should apply to alienation of affection.²¹ The majority reasoned that, like the plaintiff in *Fulkerson*, John “did not notice any changes or loss in his marriage during the time of the affair.”²² The majority concluded that because loss of consortium is “readily perceivable” by a reasonably diligent spouse,²³ John *should have* known of Sandra’s loss of affection at the time of the affair, and his failure to bring a cause of action within three years of the loss meant that his claim was barred.²⁴

Justice Chamberlin’s special concurrence agreed with the majority’s opinion, but called for *abolition* of the tort altogether.²⁵ Justice Chamberlin noted that only six out of fifty states still

¹⁷ MISS. CODE ANN. § 15-1-49(2) (1990).

¹⁸ 53 So. 3d 849, 852-53 (Miss. Ct. App. 2011).

¹⁹ *Fulkerson*, 53 So. 3d., at 853.

²⁰ *Id.*

²¹ See *Davis v. Davis*, 360 So. 3d 196, 202 (Miss. 2023).

²² *Id.* (quoting *Fulkerson*, 53 So. 3d at 853).

²³ *Id.*

²⁴ *Id.* The majority also noted that the damages awarded to John for alienation of affection could not be transferred to his other claims of fraud and intentional infliction of emotional distress because John failed to give separate instructions for damages related to those claims at trial. *Id.* (a trial court is not obligated “to instruct the jury *sua sponte*, nor is a court required to suggest instructions in addition to those which the parties tender” (quoting *Conner v. State*, 632 So. 2d 1239, 1254 (Miss. 1993), *overruled on other grounds* by *Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999)); *Miss. Valley Silica Co. v. Eastman*, 92 So. 3d 666, 670-71 (Miss. 2012).

²⁵ *Davis*, 360 So. 3d at 203 (Chamberlin, J., specially concurring).

recognize the intentional tort, one that has its roots in the traditional belief that women were the chattel of their husbands.²⁶ He added that although the common law tort's genesis extended the right to sue to the female spouse and changed its express purpose to protecting marital union, the tort accomplished no such purpose.²⁷

Justice Chamberlin cited Justice Dickinson's concurrence in *Fitch* to illustrate this, stating: "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."²⁸ Justice Chamberlin further argued that regardless of the tort's purpose, affection is consensually bestowed upon the third party, and the tort fundamentally mischaracterizes such affection as property which can be stolen.²⁹ Justice Chamberlin concluded that abolishing the tort would not send a message that the Court no longer believes that "the bonds of marriage are a sacred and societal good"; rather, it would demonstrate that the Court has modernized and eliminated the harm that the tort inflicts on marital and familial relationships.³⁰

Although Justice Chamberlin's special concurrence presents a thorough indictment of alienation of affection and proposes an important reckoning with the problematic history behind one of Mississippi common law's torts, Justice Chamberlin limited his special concurrence's persuasive power by not offering an alternative avenue for a spurned spouse to seek legal redress. Justice Chamberlin's assertions regarding the problematic history and nature of the tort are corroborated by Justice Dickinson's concurrence in *Fitch*,³¹ as well as the majority in *Saunders*, which noted the tort "originated on the common law belief that wives were the chattel of their spouse."³² Justice Chamberlin also made a compelling argument against the law's interpretation of affection

²⁶ *Davis*, 360 So. 3d at 203 (Chamberlin, J., specially concurring).

²⁷ *Id.*

²⁸ *Id.* at 204 (quoting *Fitch v. Valentine*, 959 So. 2d 1012, 1032 (Miss. 2007) (Dickinson, J., concurring) (citation omitted)).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Fitch*, 959 So. 2d at 1031-32.

³² *Saunders v. Alford*, 607 So. 2d 1214, 1215 (Miss. 1992).

as property.³³ Indeed, such a characterization relies on a problematic refusal to recognize the abilities of consent and agency in a spouse, which is logically akin to the presumptions underlying the original purpose of the tort.

Justice Chamberlin could have addressed the concerns of prior caselaw by identifying a legal alternative for spouses to pursue redress. The majority in *Fitch* declined to abolish alienation of affection due in part to the fact it is “the only available avenue to provide redress for a spouse who has suffered loss and injury to his or her marital relationship against [a] third party.”³⁴ By highlighting present alternatives or proposing a broader interpretation to an existing cause of action to accommodate claims against the third party – like intentional infliction of emotional distress – Justice Chamberlain could have eased the anxiety felt by justices reluctant to abolish alienation of affection in the common law.

As stated at the outset of this note, *Davis v. Davis* presented a notable development to Mississippi's common law tort of alienation of affection. Time will tell, however, whether *Davis* will serve as a seminal moment in the debate over the tort's continued viability. In his special concurrence in *Davis*, Justice Chamberlin limited the likelihood of future courts to follow his call to abolish alienation of affection, as he presented ample reasons to abolish it but failed to address a crucial reservation among tort proponents: in the absence of alienation of affection, how may an aggrieved spouse proceed against a third party whom the spouse perceives as the cause of the marital relationship's ruin? Should any such cause of action against a third party exist at all, and if not, why?³⁵

Mississippi has recognized concern that “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

³³ *Davis*, 360 So. 3d at 204 (Chamberlin, J., specially concurring).

³⁴ *Fitch*, 959 So. 2d at 1020.

³⁵ In his special concurrence in *Bland v. Hill*, Chief Justice Smith asked foundational questions underpinning his advocacy for the tort. *Bland v. Hill*, 735 So. 2d 414, 422 (Miss. 1999) (Smith, J., specially concurring) (“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.”). Justice Smith is far from an outlier in his support of the tort.

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.'"³⁶ Given this express interest in preserving the sanctity of marriage, a successful argument for the abolition of alienation of affection must ensure the reluctant majority that abolition will further, or at least not hinder, that interest.

It remains unclear whether *Fitch's* rationale for preserving the tort will endure much longer, but absent an argument to the contrary that addresses these questions prompted by abolition of the tort, one can reasonably expect Mississippi's continued adherence to *Fitch*. In summary, Justice Chamberlin's concurrence, although an important reckoning with the history of alienation of affection, did not ease the anxiety of his fellow justices created by the prospective abolition of the tort, and this could lead to continued reluctance by the Court and indefinitely postpone any goals of its abolition. Times are changing, however, and the onus rests on skilled litigators to formulate a creative answer to the concerns of abolition; if that answer proves cogent, it just may be the final blow to alienation of affection in Mississippi.

³⁶ *Bland*, 735 So. 2d at 422 (citing *Saunders*, 607 So. 2d at 1215); see also *Fitch*, 959 So. 2d at 1020.