IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

JERRY W. CEDAR,		
	*	Appeal No. 28441
Appellant,	*	
	*	
v.	*	
	*	
BRUCE JOHNSON,	*	
	*	
Appellee.	*	

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
BROWN COUNTY, SOUTH DAKOTA

THE HON. RICHARD SOMMERS, CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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NOTICE OF APPEAL FILED November 2, 2017

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PRELIMINARY STATEMENT

For convenience, the Plaintiff – Appellant, Jerry W. Cedar, will be referred to as "Cedar" and the Defendant – Appellee, Bruce Johnson, will be referred to as "Johnson."

The trial transcript will be referred to as "TT at_____." The docketing statement will be referred to "DS at _____."

JURISDICTIONAL STATEMENT

This appeal is taken from an Order Granting Defendant's Motion for Judgment as a Matter of Law and Dismissing Case filed October 4, 2017. DS at page 330.

Cedar filed a timely Notice of Appeal on on November 2, 2017, pursuant to SDCL 15-26A-4.

LEGAL ISSUES

1. Whether or not the trial judge committed reversible error when he ruled a Plaintiff in an alienation of affection trial, must testify in his case-in-chief, to the pecuniary value of his loss of love and/or consortium, physical pain, mental agony, lacerated feelings, wounded sensibilities, humiliation, blow to honor, hurt to family life, suspicion cast on offspring, etc.

   The trial court held that a Plaintiff must testify in his case-in-chief to the pecuniary value of his loss of love and consortium, physical pain, mental agony, lacerated feelings, wounded sensibilities, humiliation, blow to honor, hurt to family life, suspicion cast on offspring, etc. After Plaintiff's case–in-chief, the

trial court granted Defendant's motion as a matter of law on the issue of damages, holding that Plaintiff did not testify as to the pecuniary value of his damages.

Morey v. Keller, 85 NW2d 57, 59 (SD 1957)

Scott v. Kikler, 297 SE2d 142, 146 (NC 1982)

Wood v. Cooley, 78 So.3d 920, at 926 (Miss. 2011)

2. Whether or not Plaintiff Cedar, through personal testimony in an alienation of affection jury trial, presented enough evidence in his chase-in-chief of damages, to submit the issue of damages to the jury.

The trial court held that a Plaintiff did not testify in his case-in-chief to the pecuniary value of his loss of love and/or consortium, physical pain, mental agony, lacerated feelings, wounded sensibilities, humiliation, blow to honor, hurt to family life, suspicion cast on offspring, etc. After Plaintiff's case–in-chief, the trial court granted Defendant's motion as a matter of law on the issue of damages, holding that Plaintiff did not testify as to the pecuniary value of his damages.

Morey v. Keller, 85 NW2d 57, 59 (SD 1957)

Scott v. Kikler, 297 SE2d 142, 146 (NC 1982)

Wood v. Cooley, 78 So.3d 920, at 926 (Miss. 2011)

STATEMENT OF CASE AND THE FACTS

A. Case History.

Cedar filed a complaint in the Fifth Judicial Circuit against Johnson, alleging alienation of affection pursuant to SDCL 20-9-7. DS at page 2. Thereafter, Johnson filed a Motion of Summary Judgment. DS at page page 11. Judge Sommers denied the motion. DS at page 169.

A jury trial was held before the Honorable Richard Sommers in the Brown County Courthouse on September 28, 2017. After Cedar's case in chief, Johnson made a motion for a judgment as a matter of law on two issues, liability and damages. TT at 114 - 116. The Honorable Judge Richard Sommers, denied Johnson's motion on liability but granted Johnson's motion on damages. TT at 116, 122. This appeal follows.

B. Statement of Facts.

Cedar and his wife, Leslie married in Leavenworth, Kansas on August 12, 2000. TT at 22-23. A son Noah was born to the couple during the course of their marriage. Id. at 23. Cedar finds work in Fredrick, South Dakota and family joins him there in September, 2014. Id. at 25-26.

In April, 2015, Jerry and wife Leslie, begin work at Titans Bar & Grill in Fredrick, a bar and grill owned by Johnson. Id. at 25-26, 73. In August, 2015, Cedar begins to notice a loss of affection from Leslie. Id. at 27-29. Cedar notices Leslie texting Johnson during work hours and after work hours. Id. at 29-30.

Johnson entered into a sexual relationship with Leslie, Johnson's wife. Id at 81-82.

Leslie moved out of the marital home in November, 2015. Id. at 33.

Cedar and Leslie eventually divorce and at the trial, Cedar was asked:

BY MR. CHRISTENSON:

Q. Why – in your mind, what did the defendant, Bruce Johnson, have to do with you getting a divorce?

A. He destroyed my family. He put me through heck. He put, at that time, our 13-year-old son through heck. I never would want a child to grow up in a broken home. But, unfortunately, he has. And I feel in my heart that if he never would have pursued Leslie, texted her, invite her over to his house for sex in the restaurant, that we'd still be married. Id at 43-44.

***

Q. You wish you were still married to Leslie?

A. Every day and every night.

Q. What do you miss most about not being married to her?

A. Just seeing her smile in the morning. I miss hearing "I love you" at night when I go to bed. I miss going out and doing things with her. I miss her love and affection that we both had.

Q. Has this been emotionally difficult for you to go through?

A. It's been emotional for me every day since this has happened. Id. at 42-43.

After Cedar's case-in-chief and he rested, Johnson's counsel made an oral motion for a judgment as a matter of law on two issues, liability and damages. TT at 114 - 116.

The Honorable Judge Richard Sommers, denied Johnson's motion on liability but granted Johnson's motion on damages. Id. at 116, 122.

Judge Summers, in deciding the issue of damages, stated:

> Mr. Christenson, I am troubled - in fact, there was – in the process of trying to do some research, and my law clerk is doing the research as we speak, about there has been a complete lack of testimony regarding what damages he may have sustained. Id. at 116.

Judge Sommers continued by stating he understood the nature of the damages testified to by Cedar but concluded that Cedar failed to meet his burden to establish the extent of the damages. Judge Sommers interpreted extent to mean a dollar amount. It was his interpretation that Cedar failed to meet his burden to prove damages because Cedar did not testify to a monetary value on his damages.

Judge Sommers stated, referring to Cedar:

> Does not there need to at least be some testimony from him that this is worth a million dollars to me? And we don't have any of that testimony. So what is the jury supposed to make a determine on? And wouldn't it all be just speculation if, in fact, they were allowed at this point in time to decide what damages are without any type of testimony from your client as to what he believes the extent of those damages are? Id. 118-119.

Judge Sommers continued:

And I don't have any problem with the nature. I certainly understand what the nature is. But without him testifying that this was worth whatever it might be worth, a million dollars, we're asking the jury just to speculate. We don't know how they would arrive at that figure. There is no testimony. I think that even in the - in any type of physical pain and suffering, there has to be some testimony about what that's worth. We're not talking about physical pain and suffering here. We're talking about mental anguish and such, loss of wife. But the Court is going to grant the directed verdict and based on the fact there's been no showing what the extent of damages are. Id. 121-122.

ARGUMENT

A. Issue Number 1.

Whether or not the trial judge committed reversible error when he ruled a Plaintiff in an alienation of affection trial, must testify in his case-in-chief, to the pecuniary value of his loss of love and/or consortium, physical pain, mental agony, lacerated feelings, wounded sensibilities, humiliation, blow to honor, hurt to family life, suspicion cast on offspring, etc.

SDCL 15-6-50(a) reads as follows:

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that

party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that tissue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

In reviewing a grant or denial of judgment as a matter of law under SDCL 15-6-50(a), the Supreme Court applies the de novo standard. *Manger v. Brinkman*, 883 NW2d 74, 80 (SD 2016).

Set forth in *State Farm Fire & Cas. Co. v. Harbert*, 741 NW2d 228, 235-36 (SD 2007) (citing) *Pickering v. Pickering*, 434 NW2d 758, 762-63 (SD 1989), are the judicially created elements of an alienation of affections claim:

1. Wrongful conduct by the defendant with specific intent to alienate one spouse's affections from the other spouse (such intent may develop at any point during the adulterous relationship);
2. Loss of affection or consortium; and
3. A casual connection between such intentional conduct and loss.

In *Morey v. Keller*, 85 NW2d 57, 59 (SD 1957), the South Dakota Supreme Court set forth the standard for what type of injury a plaintiff may recover in an alienation of affection claim:

The plaintiff in an action for alienation of affections may recover for all direct and proximate losses occasioned by the tort, including loss of love and consortium,

and he or she may recover for any physical pain, mental agony, lacerated feelings, wounded sensibilities, humiliation, blow to honor, hurt to family life, suspicion cast on offspring, etc. 27 AmJur., Husband and Wife, § 543.

The court continued:

The courts recognize the impossibility of formulating a definite rule whereby the loss of affection or consortium in money can be determined and the jury must be allowed a wide latitude. (Emphasis added) Id.

It is not disputed that Cedar did not testify as to the pecuniary value of the damages he incurred as a result of the intentional acts of Johnson. He only testified as to the damage to his marriage, his family and to himself. The rational for this, of course, is that Cedar's counsel would ask the jury to award Cedar money for damages incurred in closing argument. Whether or not he would ask the jury to award one million dollars in damages as discussed by Judge Sommers, would depend on how Cedar's counsel felt the trial went.

Outside of the *Morey v. Keller* case, the South Dakota Supreme Court has not addressed this issue. However, the states of North Carolina and Mississippi cast some light on the issue. As early as 1982, the Court of Appeals of North Carolina addressed the issue of pecuniary damages in an alienation of affections case. The Court stated:

> Defendant's third argument is that the trial court erred by not allowing his motion to set aside the award of damages because plaintiff failed to show that he suffered any pecuniary loss since his income increased after his divorce. Defendant is mistaken in his belief that compensatory damages must be based on pecuniary loss. In determining compensatory damages, the jury may also consider the loss of consortium, humiliation, shame, mental anguish, loss of sexual relations, and the disgrace the tortious acts of defendant have brought. . . . . Merely because plaintiff had a better paying job after the divorce does not necessarily diminish his suffering from losing his wife. *Scott v. Kikler*, 297 SE2d 142, 146 (NC 1982).

In *Hutelmyer v. Cox*, 514 SE2d 554, 561 (NC 1999), the Court stated:

In addition to plaintiff's evidence showing a loss of income, life insurance, and pension resulting from the actions of defendant, there was plenary evidence that plaintiff likewise suffered loss of consortium, mental anguish, humiliation, and injury to health.

In *Nunn v. Allen*, 574 SE2d 25, at 43-44 (NC 2002), the Court stated:

Defendant also assigns error to the denial of his G.S. § 1A-1, Rule 59 motion to set aside the compensatory damage verdict for alienation of affection and grant a new trial. He argues on appeal that there was no evidence to support the award of compensatory damages for alienation of affection and thus the trial court erred in its denial of the motion.

In a cause of action for alienation of affections . . . the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by [plaintiff] through the defendant's wrong. In addition thereto, [plaintiff] may also recover for the wrong and injury done to [plaintiff's] health, feelings, or reputation.

In *Hayes v. Waltz*, 784 SE2d 607, at 618 (NC 2015), the Court stated:

In the present case, Plaintiff offered evidence that due to the alienation of affections between himself and Ms. Hayes, he suffered both emotionally and financially. Plaintiff testified that he lost support of Ms. Hayes' income and that the marital home went into foreclosure because he could not afford the mortgage payment on his salary alone. He further testified that he was "devastated" emotionally by the loss of Ms. Hayes' affections and the dissolution of their marriage. Plaintiff described the emotional impact of spending less time with his children because they no longer lived with him full time. he also testified that friends viewed and treated him differently as dis others in the general community due to the deterioration of his relationship with Ms. Hayes and the loss of Ms. Hayes' affections impacted his relationships with others.

The Mississippi Court of Appeals in *Wood v. Cooley*, 78 So.3d 920, at 926 (Miss.

2011), stated:

Thus, Plaintiff offered evidence that supported an award of compensatory damages, and the trial court did not manifestly abuse its discretion by denying Defendant a new trial.

The extent of damages that Cooley suffered is disputed; therefore, "the jury establishes the value of the loss suffered . . ." *Fitch v. Valentine*, 959 So.2d 1012,

1030 (¶49) (Miss. 2007). After finding Wood responsible for alienating the affection of Jennifer, the jury valued the loss of affections and loss of the marriage at $100,000.

By the Supreme Court's own admission agreed that a jury should be given great latitude in determining damages in an alienation of affections case when the Court stated:

> The courts recognize the impossibility of formulating a definite rule whereby the loss of affection or consortium in money can be determined and the jury must be allowed a wide latitude. *Morey v. Keller*, at 59.

It is equally difficult for a plaintiff to place pecuniary value on the loss of a marriage. A plaintiff in an alienation affection case should not be mandated to put an arbitrary figure on his damages in his case-in-chief. The proper time to argue damages is in closing argument in an alienation of affections case.

B. Issue Number 2.

> Whether or not Plaintiff Cedar, through personal testimony in an alienation of affection jury trial, presented enough evidence in his chase-in-chief of damages, to submit the issue of damages to the jury.

A loss of consortium is the actionable consequence of an action for alienation. *Holmstrom v. Wall*, 268 NW 423 (1936). Consortium is a right growing out of the marital relationship. This term includes the right of either spouse to the society, companionship, conjugal affections, and assistance of the other. *Morey v. Keller*, Id at

58. A loss or impairment of any such elements will sustain an action for alienation of affections. Id.

Alienation of affections is an action sounding in tort. *Veeder v. Kennedy*, 589 NW2d 610 at 613 (SD 1999). The measure of damages for torts is determined by SDCL 21-3-1, which provides, "[f]or the breach of obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately cause thereby, whether it could have been anticipated or not." Specifically referring to damages for alienation of affections claims, the South Dakota Supreme Court recognized:

> The plaintiff in an action for alienation of affections may recover for all direct and proximate losses occasioned by the tort, including loss of love and consortium, and he or she may recover for any physical pain, mental agony, lacerated feelings, wounded sensibilities, humiliation, blow to honor, hurt to family life, suspicion cast on offspring, etc. *Morey v. Keller*, at 59.

Because Cedar testified that Johnson destroyed his family, that Cedar suffered emotionally and lost the consortium of his wife because of the act s of Johnson, Johnson should not be granted a judgment as a matter of law against Cedar.

CONCLUSION

Cedar respectfully request the Supreme Court to reverse the trial Court and send the case back to the Fifth Judicial Circuit for a new trial on all issues.

Respectfully submitted this __23rd____day of February, 2018.

CHRISTENSON LAW, Prof. LLC

___Robert A. Christenson_____

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully request oral argument.

__Robert A. Christenson____
Robert A. Christenson

CERTIFICATE OF SERVICE

Robert A. Christenson, Attorney for appellant, Jerry Cedar, hereby certifies on February __23rd__, 2018, two (2) true and correct copies of Appellant's Brief were served by mailing, first class mail, upon:

Thomas J. Cogley, Esq.
PO Box 759
Aberdeen, South Dakota 57402-0759, and

the original and two (2) true and correct copies of Appellant's Brief were served by mailing, first class mail, upon:

Shirley Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501, and

Appellant's Brief was electronically filed pursuant to SDCL 15-26C-1.

Dated this _23rd___ day of February, 2018.

CHRISTENSON LAW, Prof. LLC

____Robert A. Christenson_____
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CERTIFICATE OF COMPLIANCE

The undersigned, Robert A. Christenson, attorney for Appellant, Jerry Cedar, hereby certifies that the forgoing Appellant's Brief, complies with the type volume limitation as stated in SDCL 15-26A-66(b)(2). The number of words in said brief totals 4,490 and the number of characters for the same totals 17,996 (no spaces).

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APPENDIX

Order Granting Motion for Judgment as a Matter of Law

Partial Transcript of Jury Trial

Docketing Statement

APPENDIX

Order Granting Motion for Judgment as a Matter of Law

STATE OF SOUTH DAKOTA)
) ss
COUNTY OF BROWN)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

* * * * * * * * * * * * * 06CIV16-000115

JERRY W. CEDAR,

Plaintiff,

vs.

BRUCE JOHNSON.

Defendant,

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW AND DISMISSING CASE

* * * * * * * * * * * * * * * * * * *

THIS MATTER having regularly come on for jury trial on the 28th day of September, 2017, in Aberdeen, Brown County, South Dakota; and the plaintiff having rested his case in chief; and the defendant having motioned the Court for judgment as a matter of law on the issues of liability and damages; and the Court having heard the evidence presented by the plaintiff and the arguments of the parties; now therefore, it is hereby

ORDERED, that the defendant's motion for judgment as a matter of law as to liability is hereby denied; and it is further

ORDERED, that the defendant's motion for judgment as a matter of law as to damages claimed by the plaintiff is hereby granted; and it is further

ORDERED, that the plaintiff's case is hereby dismissed by the Court.

Dated this ___ day of October, 2017.

Signed: 10/4/2017 1:58:00 PM

BY THE COURT:

Circuit Court Judge

Attest:
Walberg, Peggy
Clerk/Deputy

Partial Transcript of Jury Trial

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF BROWN)	FIFTH JUDICIAL CIRCUIT

JERRY CEDAR,
Plaintiff,
vs.
BRUCE JOHNSON,
Defendant.

CIV. 16-000115

Jury Trial

BEFORE: **THE HONORABLE RICHARD SOMMERS**
Circuit Court Judge
Aberdeen, South Dakota
September 28, 2017

APPEARANCES:

For the Plaintiff: **MR. ROBERT A. CHRISTENSON**
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For the Defendant: **MR. THOMAS J. COGLEY**
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court reporter can't take two people at the same time.

THE WITNESS: Okay.

THE COURT: All right?

THE WITNESS: Yes.

DIRECT EXAMINATION

BY MR. CHRISTENSON:

Q. Good morning.

A. Good morning.

Q. Would you please state your name.

A. Jerry W. Cedar, C-E-D-A-R.

Q. And where do you live?

A. In Frederick, South Dakota.

Q. And are you employed there?

A. Yes and no. I'm on disability, but I drive semi part-time outside of Frederick.

Q. Are you working now?

A. Yes, part-time.

Q. And what's your line of work then?

A. Driving semi, hauling grain and corn.

Q. Now, was there a time when you married your ex-wife, Leslie?

A. Yes.

Q. And when was that?

A. That was in August 12th of 2000.

Q. Where did you get married?

married

married

A. Leavenworth, Kansas.

Q. Were you in love with her at the time?

A. We were.

Q. And do you have any children, you and Leslie together?

A. Yes, I do. We have one son who had just turned -- or about to turn 16.

Q. And where does he live?

A. He lives with me.

Q. Is that after the divorce?

A. Yes. I have -- I -- I got custody of him through the divorce.

Q. Is -- is he going to school?

A. Yes, in Frederick.

Q. Okay. And how is he doing in school?

A. Like a teenage boy who should apply himself a little more, but he does pretty good.

Q. Was there a time then when you moved from Leavenworth, Kansas?

A. Yes.

Q. And where did you go?

A. We were living in Leavenworth, Kansas. And in around June of 2006, we found out that Leslie's father had stage IV colon cancer. So we decided to go ahead and move back to the Cities area so we can kind of help take care of him, because her mom also had lymphoma and

A. It was hard, but we -- we managed. We -- I didn't get a lot of weekends off, so she would travel up to the Dakotas to see me. And the times that I would have off, then I would go back to Wisconsin to see her. So we tried to see each other as much as we could during the year that I was away from the home and up here working.

Q. At this time did you put your Wisconsin home up for sale?

A. We did. I -- when I came out here to work, I got talked into working a little bit longer through -- after the harvest season. And the individual that I was with on the farm, he offered me kind of a part-time/full-time position.

So Leslie and I discussed it. We knew her situation with her mom too. We had just lost her father then, but she was okay with it. And she wanted to go ahead and move and have a new life out in South Dakota. So we did put our house up for sale and it sold eventually. And then Leslie and Noah came out here and joined me.

Q. What was the date? When did you move to South Dakota?

A. September of '14.

Q. And then was there a time that you and Leslie started to work at the Titan's Bar and Grill in Frederick?

A. We did.

Q. When was that?

A. I believe it was April of 2015. We got word that Mr. Johnson had came into town and purchased the restaurant, but he didn't have any help. So Leslie went down and helped as a waitress, and then I went down in my evening times and helped cook, do the cooking down there.

Q. When you and Leslie started to work at Titan's Bar and Grill in Frederick, was there affection between you and Leslie?

A. Yes, there was.

Q. Explain that. Did you go out on picnics? Tell me how you expressed your affection toward each other.

A. Well, before we started working there, we had cattle together, so we were always doing a lot of things with our cattle. She'd come out and help me, ride in the semi, taking hay out to the cattle. We would take weekend trips with the family and the dog out to Whitestone Battlefield, Wylie Park.

Any time I wasn't working and we had time, we would go do something together because that's what we loved to do. We loved to hike. She loved -- she was a very nice agate hunter. I don't know if anybody knows what agates are, but she loves hunting agates. And,

unfortunately, there isn't many out here, but we used to do that a lot too. So any time we had the time, we were always out doing something.

Q. Did you hug Leslie during this time?

A. All the time. We tried it ourselves -- sorry. Every night, no matter what happened or if we had a bad day, we'd always tell each other that we loved each other at night before we went to sleep.

Q. Was there a time that you felt that this affection Leslie had for you changed at all or started to change?

A. Yes.

Q. When was that?

A. Around the latter part of August of 2015 and kind of the beginning of September of 2015.

Q. What did you notice?

A. Well, when we first started down there, we were unaware that Bruce had a wife that was dying of cancer back away in Iowa and had a troubled teen with her. We didn't know that he had a wife.

And when we started working with him, we learned shortly, like, four or five days after that -- he asked us if we would run the restaurant and the bar for him while -- because his wife came to visit one time in -- I think, maybe twice in eight months.

And the second time she came up to visit him,

NOTICED LOSS OF AFFECTION

when she went back home she ended up passing away three days later. And this was right about the time that we had started working there. So Mr. Johnson asked Leslie and myself if we would mind keeping the restaurant open for him while he went back and took care of family matters with his wife.

I noticed when we -- in August and the beginning of September, not only did I notice a change in my wife because she is a creature of habit, but I also noticed a difference in the way Bruce, or Mr. Johnson, was treating me also down at the restaurant.

If I was down there working in the evening time and Leslie wanted to bring our son in for ice cream or something in the evening time, no matter what Mr. Johnson was doing, whether he was back helping cooking or if he was pouring a drink in the bar, when he seen Leslie walk in, he would drop what he was doing and run up to her and start a conversation and try and laugh and joke with her.

I noticed this behavior and I brought this up to Leslie and I said: You know, have you noticed a difference how Bruce used to talk to me when I first started there to now where we are and how he's treating me now?

And she just kind of laughed it off and said: I

Change in AFFECTION

think he's just being friendly.

But it was around that time that I noticed that her attitude started to change towards me and her phone could never be left laying around the house anymore. I wasn't allowed on the phone. So it was just a different type -- the affection was kind of getting a distance between her and I at that point.

Q. Do you have -- did you draw any conclusion of why there was this loss of affection?

A. Yes.

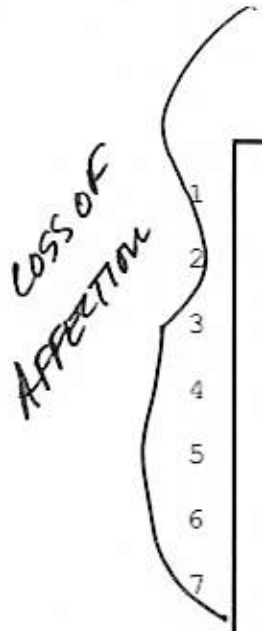
Q. And what was that?

A. It was my conclusion that Mr. Johnson initiated the contact with my wife and started texting her. They started texting and calling when I would leave the home, like, at 5:00 in the morning to go drive semi. They were texting back and forth.

I don't know how many bosses or employees are going to text at 5:00 in the morning. You know, I would think that's kind of for regular office hours. But I noticed that she was texting him back and there was one evening I can remember, I just out of the blue asked her, I said: Who are you texting?

And she goes: Oh, I'm texting Hailey, our daughter.

I would send Hailey a text and just ask her and



say: Have you heard from your mom just now?

And she would reply back: No, I haven't heard from her in a couple days.

So that got me to thinking that, yes, there was somebody she was texting, and I found out through phone records that I got on the computer that it was between Mr. Johnson and her.

Q. Who's Archibald Linthorne?

A. Junior is the gentleman who runs the elevator in Frederick, South Dakota.

Q. And how do you know him?

A. He's a good friend. He's a good friend to everybody. I mean, he's a very joking type of guy, loves everybody. He's just everybody's friend, and we met him through down at the bar through Mr. Johnson, being down at Titan's.

Q. Were you aware -- let's go back to October of 2015. Were you aware of -- in October of 2015, were you aware that Archibald had a relationship with Leslie?

A. Absolutely not.

Q. Were you aware that Leslie has alleged to have sent a text to Archibald in October of 2015 stating that something to the effect that: Can we have sex?

A. Absolutely not. In fact, she testified in her deposition that she wasn't that kind of woman and she

and she told me, you know, that he worked his charm on her and he -- and she fell for it.

She knew -- she made a comment that said I probably would never be able to forgive her because of what she did. But I did give her an ultimatum and I told her and I gave her the choice: You can stop working down at Titan's and not be around Bruce. We will try and work it out and see what happens.

But she decided in the end to go ahead and move out of the home on around November 20th.

Leslie moves out of home

Q. Let's go back to August of 2015.

A. Okay.

Q. Do you have an anniversary in your marriage?

A. Yes. August 12th of 2015 was our 15th year anniversary.

Q. And was there affection between you and Leslie at that time?

A. Yes, there was.

MR. CHRISTENSON: Tom, I'm going to show him Exhibit 2.

Your Honor, if I can approach the witness?

THE COURT: Yes.

BY MR. CHRISTENSON:

Q. I'm going to give you what's been marked as Exhibit Number 2.

to Whitestone Battlefield. I have a Red Heeler. He likes to run. He was my cattle dog. He loves to run. So we would take trips all the time out to Whitestone Battlefield and let him run. And we always would walk around and, of course, she was always having to look for agates anywhere she went, but --

Q. You still communicate with Leslie from time to time?

A. Pretty much almost every day.

Q. And how does that go?

A. There's days I can tell she's not having a really good day because she's got some medical issues. So I can tell she's not in a good mood, but for the most part we -- we text. You know, pretty much almost every day there's a text either from me or from her.

And if I'm in town, she will text and see if I'm in town and ask me if I would mind getting something for her, which I -- I never do mind. I do do that for her. And, course, we have our son together and her daughter which I've always considered my daughter and not a stepdaughter, but --

Q. You wish you were still married to Leslie?

A. Every day and every night.

Q. What do you miss most about not being married to her?

A. Just seeing her smile in the morning. I miss hearing "I love you" at night when I go to bed. I miss going

still wanted to be married to Leslie

out and doing things with her. I miss her love and affection that we both had.

Q. Has this been emotionally difficult for you to go through?

A. It's been emotional for me every day since this has happened.

Q. Did you eventually file for divorce?

A. I did.

Q. Why did you file for divorce?

A. Because when we talked -- and I asked her before she left the home, if I would at least get the explanation, and we sat up in the bedroom and we talked and she looked me in the eye and said that she --

MR. COGLEY: Objection; hearsay.

THE COURT: Sustained.

THE WITNESS: She just knew that I wouldn't be able to forgive her for falling into what had happened between Mr. Johnson and her.

BY MR. CHRISTENSON:

Q. Why -- in your mind, what did the defendant, Bruce Johnson, have to do with you getting a divorce?

A. He destroyed my family. He put me through heck. He put, at that time, our 13-year-old son through heck. I never would want a child to grow up in a broken home. But, unfortunately, he has. And I feel in my heart

that if he never would have pursued Leslie, texted her, invite her over to his house for sex or had sex in the restaurant, that we'd still be married today.

MR. CHRISTENSON: I have nothing further.

THE COURT: Mr. Cogley, would -- I don't know. I assume you're going to take more than 15 minutes, so maybe we'll take lunch break here and return at 1 p.m.

So, ladies and gentlemen of the jury, I will remind you once again that you are not to discuss any aspect of this case among yourselves or with anyone else and that you should not form or express any opinion on the case until it is given to you for decision. You are free to leave the courthouse for lunch, I will tell you that. So all rise.

(WHEREUPON, the jury exited the courtroom.)

(WHEREUPON, there was a recess.)

(WHEREUPON, the jury returned to the courtroom.)

THE COURT: Be seated.

Mr. Christenson, are you satisfied that all the jurors are present?

MR. CHRISTENSON: I am, Your Honor.

THE COURT: Mr. Cogley?

MR. COGLEY: Yes, Your Honor.

Q. Would you please state your name.
A. Bruce Johnson.
Q. And where do you live?
A. Frederick, South Dakota.
Q. And how long have you lived there?
A. Two and a half years.
Q. Do you live in the town?
A. Live in town.
Q. And you own a business there?
A. I do.
Q. What's the name of that business?
A. Titan's Bar and Grill.
Q. And what -- how long have you owned that business?
A. Two and a half years.
Q. What type of business is it?
A. Bar and grill.
Q. Serve drinks?
A. What's that?
Q. Serve drinks?
A. Yes.
Q. Beer?
A. Yes.
Q. Wine?
A. Yes.
Q. Hard drinks?

TITAN Bar & Grill

A. I did.

Q. And was her -- did there come a time when you invited her over to your home after that?

A. Yes.

Q. And did you invite her over to your home to have sex with her?

A. Once, yes.

Q. And when was that?

A. It would have been November, late November just before Thanksgiving.

Q. And you knew she was married?

A. I did.

Q. Knew she had two children?

A. Yes.

Q. And you knew her husband?

A. Yes.

Q. Okay. Her husband would work for you from time to time, wouldn't he?

A. He did.

Q. And you -- would you consider him your friend?

A. No.

Q. Did you ever have -- prior to you inviting Leslie to your home, did you ever have sex with her in your restaurant?

A. No.

Johnson has sex with Leslie Cedar's wife

Johnson has sex with Cedars's wife

Q. When -- did you ever have sex with her in your restaurant?
A. No.
Q. Never?
A. No.
Q. Only in your home?
A. No.
Q. Where else?
A. There's an office in the back of the restaurant, an apartment, but not in the restaurant. No.
Q. Okay. But it's part of the restaurant building?
A. It's attached. Yes.
Q. Okay. How many times have you had sex with her there?
A. One time.
Q. So how many times up until you invited her to your home, you'd only had sex with her once before?
A. Never.
Q. Well, explain how many times.
A. One time at my house before Thanksgiving.
Q. Okay. And at that time, did you tell her you love her?
A. No.
Q. Had she ever told you she loves you?
A. What's that?
Q. Had she ever told you she loves you?
A. Yes.

Motion on Liability

I would make a motion for a judgment as a matter of law on two issues. The first one has to do with liability. I think that the case law and the jury instructions make clear that Bruce has to have a specific intent to alienate Leslie's affection. And there hasn't been any testimony during the plaintiff's case that she had any affections.

And as a result of that, I don't know how they've met their burden of proof or even submitted an issue to the jury as presently set forth. I know that there's some -- I know that one of the jury instructions we'll be talking about is the cause of action and what needs to be proven, but whichever one the Court uses requires it to be shown that Bruce acted with the specific intent to alienate her affections. And they haven't shown us anything that he knew that there were affections to alienate, just the opposite according to what Leslie just testified to.

I think the case law is pretty clear that he has to know about it. I think that the case law is pretty clear that if there are no affections or if he doesn't know of any affections, then he can't have alienated those affections.

And so I think we're entitled to a motion a judgment as a matter of law or a directed verdict as to

MOT'N on Damages

the issue of liability. Barring that, I think we'd be entitled to a motion -- or a judgment as a matter of law as to the question of damages because there hasn't been any showing of damages whatsoever.

And that's really the crux of one of the things that the plaintiff would have to prove. And we didn't hear anything. And now they've rested and -- and so I believe that -- again, I believe that we should be entitled to judgment as to the question of liability for the reasons that I set forth. And I believe we are entitled to judgment on the issue of damages.

I had brought -- there has to --

THE COURT: I'm aware of the jury instruction that talks about the nature and the extent of damages. Is that what you are looking for?

MR. COGLEY: I was just going to quote the Court to a couple of cases with respect to compensatory damages. And the first one would be the Kjerstad decision. It looks like the cite is 517 N.W.2d 419. In that case they were actually talking about punitive damages and the fact that you can't get punitive damages absent an award of compensatory damages. But they talk about in this case the plaintiff has testified about the physical and emotional reaction from the experience and they had medical expenses

associated with that.

Another case that I can -- I pulled up on my phone because I didn't have time to print it out is the Engels decision, 2000 SD 1, and it simply says that the award of damages must not be the product of passion and prejudice and must be supported by the evidence.

And we don't have any evidence that there were any damages. And so I would ask for a judgment as a matter of law on that issue as well.

Denied as to Liability

THE COURT: Well, as to the first request, the Court would deny that. There is some evidence that there were affections. That's for the jury to make that determination. Certainly, Mr. Cedar testified that his wife exhibited affection towards him. That's for the jury to determine.

Mr. Christenson, I am troubled -- in fact, there was -- in the process of trying to do some research, and my law clerk is doing the research as we speak, about there has been a complete lack of testimony regarding what damages he may have sustained.

And, of course, one of the factors in your own jury instruction is the nature and extent of damages. So what would be your response to that?

MR. CHRISTENSON: The plaintiff in an action for alienation of affections may recover for all direct

on it. If they ask a jury, he'd say he can't -- he can't put a value on it. He lost his marriage, he lost his --

MR. COGLEY: Your Honor, I appreciate what Mr. Christenson is doing, but Jerry can't tell us now. He's rested.

MR. CHRISTENSON: Right, but --

THE COURT: As proposed by Plaintiff, to recover damages for alienation of affections, the following elements must be proven by the greater convincing force of the evidence. The nature, clearly, the loss, the loss of the wife, the hurt feelings, all of that that you indicated.

But the extent, that is, also, the nature and extent of the damages. Now, does not "extent" mean the amount? What is the dollar amount? And I believe the Supreme Court has also said the people can testify as to what they feel their damages are and that it doesn't necessarily take any type of expert opinion.

Does not there need to at least be some testimony from him that this is worth a million dollars to me? And we don't have any of that testimony. So what is the jury supposed to make a determination on?

And wouldn't it all be just speculation if, in fact, they were allowed at this point in time to decide

what damages are without any type of testimony from your client as to what he believes the extent of those damages are?

MR. CHRISTENSON: I don't read it like that. I think he's testified to his mental pain, his loss of his marriage.

THE COURT: Again, that's the nature of the damages, the mental pain and suffering. But there has been absolutely no evidence to show what that's worth to him. I'm going to give -- we're going to take a short recess here. Again, I have my law clerk researching that issue, and I'll be back. I'll come get you guys when we're ready when I've had an ample opportunity see what we come up with. So we'll be in recess.

MR. COGLEY: Judge, before -- I'm sorry. And that's fine. The one -- this Junior, I'd just really like to get him in. If we need to get him in, I'd really like to get him in today.

THE COURT: We'll have time to do that.

(WHEREUPON, a recess was held at this time.)

THE COURT: All right. Did you decide to present any more argument regarding this issue?

MR. CHRISTENSON: I do Your Honor.

THE COURT: Go ahead.

determined and the jury must be allowed a wide latitude.

So that's why it's our position that for the Court to require us to essentially make an argument on damages, in Plaintiff's case, I think, is inconsistent with the Court's say. And we can do that in closing argument.

THE COURT: Mr. Cogley, anything further?

MR. COGLEY: No, Your Honor.

THE COURT: The Court has looked at the "Morey v. Keller" case and admittedly that was wrongful conduct, loss of affection or consortium, and a causal connection between such conduct and loss. And in Veeder, the Court upheld an additional requirement, the nature and extent of damages suffered by the plaintiff as a proximate result of the defendant's conduct.

And I don't have any problem with the nature. I certainly understand what the nature is. But without him testifying that this was worth whatever it might be worth, a million dollars, we're asking the jury just to speculate. We don't know how they would arrive at that figure. There's no testimony.

I think that even in the -- in any type of physical pain and suffering, there has to be some testimony about what that's worth.

Judge's comments decision

MOTION GRANTED AS TO DAMAGES

We're not talking about physical pain and suffering here. We're talking about mental anguish and such, loss of a wife. But the Court is going to grant the directed verdict and based on the fact that there's been no showing what the extent of damages are.

Anything further from counsel?

All right. Then we'll bring the jury back in and dismiss the thing.

(WHEREUPON, the jury returned to the courtroom.)

THE COURT: Ladies and gentlemen of the jury, this case is now complete. You will not be asked to render any type of verdict or hear any more additional testimony. I want to thank you for your appearance here today and for your listening to things carefully and to help us get things resolved. But you are free to leave at this point in time, and you are free to discuss the case amongst yourselves or with anyone else that you wish to.

Again, if you received any parking tickets as a result of today's appearance, you are free to bring that to the clerk of court's office to be taken care of. I believe your term has ended. So unless you were lucky enough to get called next year or sometime after that, you shouldn't have to sit there any more. So

Docketing Statement

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Total Pages: 345

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

JERRY CEDAR,
Plaintiff and Appellant,

vs. Appeal No. 28441

BRUCE JOHNSON,
Defendant and Appellee.

Appeal from the Circuit Court, Fifth Judicial Circuit
Brown County, South Dakota
The Honorable Richard A. Sommers, Presiding

APPELLEE'S REPLY BRIEF

Notice of Appeal was filed on November 2, 2017.

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JURISDICTIONAL STATEMENT[1]

The appellee, Bruce Johnson ("Johnson") accepts the jurisdictional statement provided by the appellant, Jerry Cedar ("Cedar").

QUESTION PRESENTED BY APPEAL AND NOTICE OF REVIEW

I. The trial court correctly ruled that Johnson was entitled to judgment as a matter of law because Cedar had provided the jury no evidence with which to determine with reasonable certainty any purported damages.

The trial court correctly granted Johnson's motion for judgment as a matter of law. Although juries are given wide latitude in assessing damages, a plaintiff must provide sufficient evidence to establish a damage award with reasonable certainty. Here, Cedar failed to introduce any evidence that he was affected by his wife's affair except to say it was "emotional." This is insufficient and would result in a damages award that could not be trusted.

Authorities: Wang v. Bekken, 310 N.W.2d 166 (S.D. 1981); Hutelmyer v. Cox, 514 S.E.2d 554 (N.C. 1999); Haves v. Waltz, 784 S.E.2d 607 (N.C. 2015).

II. SDCL 20-9-7 should be declared void on grounds of public policy because it represents an outdated, archaic view of spouses as property.

The trial court should have granted Johnson's motion to dismiss on grounds of public policy. A cause of action for alienation of affection is outdated and fails to protect any of the interests its proponents claim that it protects.

Authorities: SDCL 20-9-7; Veeder v. Kennedy, 1999 S.D. 23, 589 N.W.2d 610; O'Neil v. Schuckardt, 733 P.2d 693 (Idaho 1986).

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[1] References to the Settled Record will be made as "SR at ____." References to the jury trial will be made as "TT at ___," with the appropriate page and line numbers included.

III. The trial court should have granted Johnson judgment as a matter of law because there was no evidence that Johnson knew that Leslie had any affection for Cedar.

The trial court should have granted judgment as a matter of law on the issue of liability. This Court's precedent required Cedar to show that Johnson had the specific intent to alienate Leslie's affections. He did not do this and therefore Johnson's motion for judgment as a matter of law should have been granted.

Authorities: Pankratz v. Miller, 401 N.W.2d 543 (S.D. 1987); Veeder v. Kennedy, 1999 S.D. 23, 589 N.W.2d 610; State Farm Fire & Casualty Company v. Harbert, 2007 S.D. 107, 741 N.W.2d 228.

STATEMENT OF THE CASE

On March 15, 2016, Cedar filed his *complaint* against Johnson for alienation of affection. Johnson filed a motion for summary judgment as to liability and, later a motion to dismiss on grounds that the public policy of South Dakota precluded a claim for alienation of affection. Both motions were denied by the Hon. Judge Richard Sommers. A jury trial commenced on September 28, 2017. At the close of Cedar's case, Johnson moved for judgment as a matter of law on the issue of liability as well as damages. The trial court granted the motion on the issue of damages. Cedar filed a timely *notice of review* on November 2, 2017. Johnson filed a timely appeal on November 21, 2017, asking this Court to review the trial court's denial of his motion to declare SDCL 20-9-7 void on grounds of public policy. He also asserted the trial court should have granted his motion on the issue of liability.

STATEMENT OF THE FACTS

Leslie Cedar ("Leslie") was unhappily married to Jerry Cedar ("Cedar"). TT at 22-23; 89:20-22. In 2006, she had an online affair, but the couple remained married. TT at 31:15-17. Eventually, in 2014, the couple decided to move to South Dakota with their son, Noah. TT at 25:22-23.

In early 2015, after his wife died, Bruce Johnson ("Johnson") moved to South Dakota to open up the Titan Bar and Grill in Frederick, South Dakota. TT at 73:11-14. A few months later, in April, Leslie began working for

Johnson at the bar. TT at 89:23-25. Both Leslie and Johnson agree that there was nothing sexual or even flirtatious about their relationship until October of 2015.

Despite the move the South Dakota, Leslie remained unhappy in her marriage. TT at 103:3-5. Her unhappiness resulted in another affair, this time a physical one. Leslie testified that on two occasions she had sexual intercourse with Archibold Linthorne ("Linthorne"). TT at 97:5-21. Leslie testified that the relationship started with flirtatious text messages and ultimately led to intercourse on two separate occasions. TT at 97-98. One of the incidents took place at an abandoned home near Frederick. TT at 98:1-3. The other incident occurred in Linthorne's home. TT at 101:17-21. Both incidents took place over approximately a week and a half during harvest season in 2015. TT at 97:10-25.

Although he was not present during either of the sexual encounters between Leslie and Linthorne, Cedar was adamant that the two did not have sex. TT at 55:12-15. As evidence, he showed the jury a photograph of the abandoned house. TT at 68:1-7. The photograph was taken over a year after the incident. TT at 68:17-19. He also stated that he went to the house after Linthorne had testified at a deposition about having sex in the home. TT at 68:14-16. Cedar stated that he could not even enter the house because there were too many obstacles in the way. TT at 69:4-16. This was the same day he took the photograph, over one year after the incident.

Based on his own detective work, Cedar determined that the story about Leslie and Linthorne was concocted. TT at 55:12-20. He provided no evidence to dispute or impeach Leslie's testimony about having sex with Linthorne in his home. He also could not explain why Linthorne would lie about this fact, thereby subjecting himself to a similar lawsuit as Johnson. TT at 56:11-25.

Throughout her testimony, Leslie reiterated that by the time she met Johnson she did not have romantic feelings for Cedar. TT at 89:20-22. In fact, Leslie stated that she had lost all romantic affection for Cedar around the year 2011. TT at 103:3-5. Nonetheless, she remained with Cedar because of their son. TT at 103:19-23. She desired to at least wait until he was eighteen before divorcing Cedar. TT at 103:19-23. Notably, Leslie made clear that she never communicated to Johnson that she had any romantic feelings for her husband. TT at 112:4-12.

When questioned by Cedar's attorney, Johnson stated that although he knew Leslie was married, "in her mind, she was done being married. . ." by the time she and Johnson became a couple. TT at 84:22-23. Johnson further testified that he never spoke to Cedar about Leslie. TT at 87:1-2. Johnson was never questioned about whether he was aware of any of the Facebook posts or photographs which Cedar claimed depicted "affection" between him and his wife. Further, Johnson was never asked whether he knew if Cedar and Leslie were sexually intimate. In Johnson's view, Leslie's marriage to Cedar was for

all intents and purposes "done" by the time she decided to be with Johnson. TT at 84:22-23.

STANDARD OF REVIEW

This Court recently stated that the standard of review on a motion for judgment as a matter of law is *de novo*. Magner v. Brinkman, 2016 S.D. 50, ¶ 13, 883 N.W.2d 74. Johnson's motion to dismiss or, alternatively, for summary judgment is likewise reviewed using a *de novo* standard. Veeder v. Kennedy, 1999 S.D. 23, ¶ 8, 589 N.W.2D 610

ARGUMENT

I. The trial court correctly ruled that Johnson was entitled to judgment as a matter of law because Cedar had provided the jury no evidence from which it could determine with reasonable certainty any purported damages.

Although this Court allows for wide latitude with regard to jury decisions on damages, there still must be sufficient evidence to allow for damages to be measured with a reasonable degree of certainty. Wang v. Bekken, 310 N.W.2d 166, 167 (S.D. 1981) (citing Schmidt v. Forell, 306 N.W.2d 876 (S.D. 1981)). Cedar provided insufficient evidence to determine damages with any reasonable degree of certainty. Therefore, the trial court correctly granted Johnson's motion on this issue.

The cases cited by Cedar all contain facts upon which a jury could provide an award with reasonable certainty. In Hutelmyer v. Cox, the plaintiff presented evidence in the form of actual physical illness, an inability to sleep

and weight gain. 514 S.E.2d 554, 562 (N.C. 1999). The plaintiff also sought counseling as a result of the affair. Id. In Hayes v. Waltz, the plaintiff spoke of the lost income he suffered and the emotional impact of spending less time in the community. 784 S.E.2d 607, 618 (N.C. 2015). He also testified that others in the community treated him differently. Id. Finally, in Nunn v. Allen, the plaintiff provided "substantial evidence" of damages, including the testimony of his father, of the mental anguish suffered by the plaintiff. 574 S.E.2d 25, 29 (N.C. 2002).

The only evidence presented by Cedar about damages suffered was his statement that the experience was emotional for him. He did not elaborate on what specifically was emotional or how the incident affected him emotionally. He did not testify to any physical effects or the need for counseling like the plaintiff in Hutelmyer. He did not present any loss of income or that his status in the community had lessened like the plaintiff in Hayes. In contrast to Nunn, who provided evidence in the form of other witnesses regarding the plaintiff's suffering, the only testimony Cedar could provide the jury were his own statements. Even that testimony was deficient. Cedar left the jury with nothing upon which to base his damages except that the experience was "emotional."

Cedar failed to provide the jury with sufficient evidence to establish an award of damages to even a reasonable degree of certainty. Beyond his statement that the incident was emotional for him, the jury had no basis for

which to base any damages verdict. As such, the trial court was correct to grant Johnson's motion for judgment as a matter of law.

II. SDCL 20-9-7 should be declared void on grounds of public policy because it represents an outdated, archaic view of spouses as property.

Alienation of affections as a cause of action should be abolished. Beginning in the 1930s, states began to judicially or legislatively abolish alienation of affections as a cause of action. Presently, only seven states permit this type of lawsuit. Forty-three other states have recognized alienation of affections claims as "archaic holdovers from an era when wives were considered the chattel of their spouse rather than distinct legal entities." Hunt v. Hunt, 309 N.W.2d 818, 819 (S.D. 1981).

It is true that this Court has previously rejected calls to abolish these claims. Veeder v. Kennedy, 1999 S.D. 23, 589 N.W.2d 610. However, nearly a decade has passed since the Court last considered the issue. At the time Veeder was decided, thirty-nine states had abolished alienation of affections as a cause of action. Id. at ¶ 12. Presently, the only remaining states which recognize this type of claim are: Hawaii, Illinois, Mississippi, New Mexico, North Carolina, South Dakota, and Utah.

There are several reasons supporting judicial abrogation of this cause of action. Crissman, Michele, Alienation of Affections: An Ancient Tort – But Still Alive in South Dakota, 48 S.D.L. Rev. 518, 528-532 (2003). For one thing, the rule "implies that people are not free to make their own decisions

and 'can be involuntarily' stolen away from a happy marriage without any fault of their own." Id. at 529. Moreover, there is no evidence that preserving the cause of action protects marriage and family. Id. at 530. Finally, as evidenced by the present case, there are really no helpful standards for establishing damages with any reasonable certainty. O'Neil v. Schuckardt, 733 P.2d 693, 698 (Idaho 1986). In O'Neil, the Idaho Supreme Court rightly noted that such verdicts are likely to be "tainted by passion and prejudice." Id.

The time has come for this Court to follow the overwhelming majority of other states and abolish this cause of action. There are no sound reasons for this type of litigation to sustain in South Dakota. Therefore, this Court should reverse the decision of the trial court and declare that SDCL 20-9-7 is void on grounds of public policy.

III. The trial court should have granted Johnson judgment as a matter of law because there was no evidence that Johnson knew that Leslie had any affection for Cedar.

At the close of Cedar's case, Johnson moved for judgment as a matter of law on the issue of liability as well as the issue of damages. As previously discussed, the trial court granted the motion as to damages. However, the trial court denied Johnson's request for judgment on the issue of liability. In denying that motion, the trial court stated that there was evidence of affection because Cedar had testified that Leslie had affection for him. This analysis fails to account for the precedent from this Court, which required Cedar to produce evidence that Johnson was aware that Leslie had affection for Cedar.

Without that evidence, there was no way for the jury to find Johnson liable, and he ought to have prevailed on his motion.

a. This Court's precedent requires Cedar to demonstrate that Johnson was aware that Leslie had affection for Cedar and that Johnson nonetheless acted with the intent to alienate Leslie's affections away from Cedar and towards Johnson.

In Pankratz v. Miller, this Court wrote that the defendant's conduct must have been calculated to cause the loss of affection. 401 N.W.2d 543, 549 (S.D. 1987). Further, in Veeder, the Court held that a plaintiff must prove that the defendant "purposefully" alienated the affections of the plaintiff's spouse and that the defendant's actions were done to accomplish that result. 1999 SD 23 ¶ 39 n14. Inherent in these holdings is that the defendant must be aware that there are affections to alienate. If no such evidence is presented, the plaintiff cannot prevail.

The Pankratz and Veeder decisions predated the Court's most recent, and most instructive, decision on alienation of affection. State Farm Fire & Casualty Company v. Harbert, 2007 SD 107, 741 N.W.2d 228. In Harbert, the Court observed that earlier decisions were conflicting on the issue of intent. Id. at ¶ 23. It described the early cases as endorsing a "relaxed general intent" to alienate the affections of another's spouse. Id. The Court recognized that the more recent decisions in Pankratz and Veeder correctly defined alienation of affections as requiring a plaintiff to demonstrate specific intent on the part of a defendant in order to sustain the claim. Id. at ¶ 22. Recently, in

Richardson v. Richardson, this Court again reiterated that a defendant must possess the specific intent to alienate a spouse's affection for the other spouse. 2017 S.D. 92, ¶ 29 n9, 906 N.W.2d 369.

In Harbert, the Court made clear that "the heart of an alienation of affections tort is the specific intent to alienate the affections of one spouse away from the other spouse." Id. at ¶ 31. The defendant must intend to alienate the affections of the plaintiff's spouse. To do so, the defendant must have known that affections existed. Evidence of improper relations alone is insufficient to establish a claim for alienation of affections. Pankratz, 401 N.W.2d at 547, n9. The trial court's analysis was short-sighted because it believed that it was sufficient for Cedar to testify that his wife had affection for him. This Court's precedent establishes that Cedar's self-serving testimony in that regard is not enough to prove liability. At the least, Cedar's testimony had to establish that Johnson knew of Leslie's affection for Cedar, yet chose to proceed anyway.

Although it appears this Court has never defined the phrase specific intent in the civil context, it has done so in the area of criminal law, noting that "the legislature may make a crime a specific intent crime under one set of circumstances, and a general intent crime under a different set of circumstances." State v. Shilvock-Havird, 472 N.W.2d 773 (S.D. 1991). Specifically, this Court has held that "specific intent has been defined as `meaning some intent in addition to the intent to do the physical act which the

crime requires,' while general intent `means an intent to do the physical act or, perhaps, recklessly doing the physical act which the crime requires.'" State v. Rash, 294 N.W.2d 416, 417 (S.D.1980) (internal citation omitted). "Thus, in order to commit a specific intent crime, an offender would have to subjectively desire or know that the prohibited result will occur. . ." Id.

Applying that analysis to this case, Cedar was required to show more than just that Johnson committed the act which led to the alienation of Leslie's purported affection. He needed to show that Johnson was aware of her purported affection when he committed the act and, further, that Johnson intended for his conduct to alienate that purported affection. Cedar did not provide any such evidence.

b. There was no evidence from which to conclude that Johnson was aware that Leslie had any affection for Cedar.

Given what this Court has written in Harbert, Pankratz, and Veeder, the trial court ought to have granted Johnson's motion for judgment as a matter of law as to liability. Cedar never established that Johnson possessed the requisite intent to alienate Leslie's affections because there was no evidence demonstrating that Johnson was aware of any affection. Although he introduced various social media posts, photographs and birthday cards that purported to demonstrate Leslie's affection for him, Cedar never presented evidence that Johnson was aware of any of those items. Further, Leslie was quite clear that she never conveyed to Johnson that she had any affection for

Cedar. In Johnson's mind, the marriage was over before he ever came into the picture. TT at 83:23-24.

Leslie's sexual affair with Linthorne is evidence that she had no affection for Cedar by the time she became involved with Johnson. The Linthorne affair took place less than a month before Leslie and Johnson ever became involved. Leslie admitted to having sex with Linthorne and Johnson testified that both Leslie and Linthorne had confirmed this fact to him.

At trial, Cedar refused to concede that his wife had an affair with Linthorne. He believed that Johnson, Linthorne and Leslie were conspiring to help Johnson win the lawsuit. Cedar testified at length about why he refused to believe that Leslie had sex with Linthorne. He offered photographs of the abandoned house in which Leslie stated she and Linthorne were intimate. Cedar argued that the photographs, taken more than one year after the incident, demonstrated that no sex took place. He had no explanation whatsoever for the fact that Linthorne and Leslie also had sex at Linthorne's house. For that, Cedar chose to simply hunker down, close his eyes and cover his ears.

The trial testimony, even when viewed in a light most favorable to Cedar, does not establish that Johnson could have been aware that Leslie had any affection for Cedar. Even Cedar's own, self-serving testimony failed to demonstrate how Johnson might have been aware there was affection between Cedar and Leslie. He never suggested that Johnson saw any of the alleged acts of affections that would have suggested the couple was happily married.

Moreover, Leslie's affair with Linthorne was evidence that her marriage to Cedar had all but met its formal end by the time Johnson even came into the picture. As such, Johnson's motion for judgment as a matter of law on the issue of liability ought to have been granted. This Court should reverse the decision of the trial court.

CONCLUSION

The trial court correctly granted Johnson's motion for judgment as a matter of law on the issue of damages. That decision should be affirmed because Cedar did not provide sufficient evidence for the jury to make a damages award to a reasonable degree of certainty. Further, this Court should take this opportunity to declare SDCL 20-9-7 void on grounds of public policy. Finally, Johnson's motion for judgment as a matter of law should have been granted on the issue of liability. That decision should be reversed.

Dated this 5th day of April, 2018.

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CERTIFICATE OF COMPLIANCE

Thomas Cogley, attorney for Appellee, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

a. Appellee's brief does not exceed 32 pages.

b. The body of Appellee's brief was typed in Times New Roman 13 point typeface, with footnotes being in 13 point typeface; and

c. Appellant's brief contains 3,133 words and 15,816 characters with no spaces and 19,155 characters with spaces, according to the word and character counting system in Microsoft Office Professional Edition 2016 for Windows 10 Professional used by the undersigned.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

JERRY W. CEDAR,		
	*	Appeal No. 28441
Appellant,	*	
	*	
v.	*	APPELLANT'S REPLY BRIEF
	*	
BRUCE JOHNSON,	*	
	*	
Appellee.	*	

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
BROWN COUNTY, SOUTH DAKOTA

THE HON. RICHARD SOMMERS, CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The trial court ***incorrectly*** ruled that Johnson was entitled to judgment as a matter of law because Cedar had provided the jury with no evidence from which it could determine with reasonable certainty any purported damages. (Emphasis added)

Alienation of affections is an action sounding in tort. The measure of damages for torts is determined by SDCL 21-3-1, which provides, "[f]or the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." *Id.*

In *Morey v. Keller*, 85 NW2d 57, 59 (SD 1957), the South Dakota Supreme Court set forth the standard for what type of injury a plaintiff may recover in an alienation of affection claim:

> The plaintiff in an action for alienation of affections may recover for all direct and proximate losses occasioned by the tort, including loss of love and consortium, and he or she may recover for any physical pain, mental agony, lacerated feelings, wounded sensibilities, humiliation, blow to honor, hurt to family life, suspicion cast on offspring, etc. 27 AmJur., Husband and Wife, § 543.

The court continued:

> *The courts recognize the impossibility of formulating a definite rule whereby the loss of affection or consortium in money can be determined and the jury must be allowed a wide latitude.* (Emphasis added) Id.

Plaintiff Cedar followed the law in South Dakota as to testifying to damages in an alienation of affection case as set forth in *Morey v. Keller*. Defendant Johnson suggests in his brief that in order to prevail in a alienation case, the plaintiff must testify that plaintiff suffered some sort of physical illness, inability to sleep, weight gain or receive counselling. He also suggested that a plaintiff must have incurred a loss of

income, or the emotional impact of spending less time in the community or that the community treated him differently. Johnson also suggested plaintiff's father must testify as to the mental anguish suffered by his son.

What if a plaintiff could not afford counselling because the plaintiff did not have money to hire a counselor? What if the plaintiff did not suffer a physician documented physical injury, again because of lack of funds to see a doctor? What if there was no loss of income because the straying spouse did not work outside the home?

As suggested by the Court in *Morey v. Keller*, Cedar testified there was a loss of love and consortium. TT 42-43. He testified as to his mental agony. *Id*. He testified as to the hurt to his family. *Id* at 42-43. Because Cedar testified that he suffered the loss of his marriage because of the actions of Johnson, suffered emotionally and a loss of consortium as a direct and proximate cause of Johnson's actions, Johnson should not be entitled to a judgment as a matter of law on the issue of damages.

II. SDCL 20-9-7 ***should not*** be declared void on grounds of public policy because it represents an outdated, archaic view of spouses as property.

This issue was previously addressed in *Veeder v. Kennedy*, 1999 SD 23, 589 N.W.2d 610.

Cedar relies on the rational set forth in the *Veeder* Court:

> The "public policy" argument of Kennedy cannot be supported by our system of law. SDCL 1-1-23 states that the sovereign power is expressed by the statutes enacted by the legislature. SDCL 20-9-7 which authorizes Michael's cause of action in this case is such a statute. Under SDCL 1-1-24 the common law thus an abrogation of the common law are in force except where they conflict with the statutory will of the legislature as expressed by SDCL 1-1-23. We are unable to locate a single case in this jurisdiction where this Court has struck down a statute as a violation of public policy. As no constitutional defects are claimed by Kennedy, we compelled to leave the cause of action intact and instead defer to the legislature's ability to decide if there is a need for its elimination. "[W]e are not legislative overlords empowered to eliminate laws whenever we surmise they are

> no longer relevant or necessary." *Matter of Certification of Questions of Law (Knowles)*, 1996 SD 10, ¶ 66, 544 N.W. 2d 183,197. The law has long recognized that a determination of policy and the duration of that policy remains within the purview of the Legislature. *Id.* "[W]hat the legislature ordains and the constitution does not prohibit must be lawful." *Knowles*, 1996 SD 10 at ¶ 73, n. 20, 544 N.W.2d at 199, n. 20 (citing *State v. Scougal*, 3 S.D. 55 N.W. 858, 864 (1892)).

Johnson's public policy argument should be rejected, especially in light of the fact he raises no constitutional issue for declaring the statute void.

> **III**. The trial court ***should not*** have granted Johnson's judgment as a matter of law because there was no evidence that Johnson knew that Leslie had any affection for Cedar. (Emphasis added)

It appears that Defendant Johnson is asking the Court to add another element to the alienation of affection statute; specifically that Johnson 'knew that Leslie had affection for Cedar.'

As set forth in *State Farm Fire & Cas. Co. v. Harbert*, 741 NW2d 228, 235-36 (SD 2007) (citing) *Pickering v. Pickering*, 434 NW2d 758, 762-63 (SD 1989), the judicially created elements of an alienation of affection claim are as follows

1. Wrongful conduct by the defendant with specific intent to alienate one spouse's affections from the other spouse (such intent may develop at any point during the adulterous relationship);
2. Loss of affection or consortium; and
3. A casual connection between such intentional conduct and loss.

Johnson is asking the Court to serve as a legislative body by adding this additional element to the cause of action and as a result, the request should be denied in a similar fashion as the previous request to declare the alienation of affection statute void.

The Court has stated that Cedar must show there was affection in his relationship with his spouse, Leslie – before Johnson appeared on the scene. The South Dakota Supreme Court has recognized that "if it appears there was no affection to alienate, recovery is precluded." *Pankratz v. Miller*, 401 N.W.2d 543, 546 (SD 1987). As a result, there may not be a loss of affections when the straying spouse did not love or express affections toward the other prior to the intervening person's actions. *Id.* at 546-47 (recognizing that there was no loss of affections based, in part, on the straying spouse's testimony, "I have not loved [my spouse] for about four, five years now"). The presence of affection between the husband and wife can be inferred, however, from such things as remorseful letters from a straying wife, testimony from the husband that there was love, and testimony from family and friends that the couple "had a wonderful marriage." *Veeder v. Kennedy*, 589 N.W.2d 610, 617 (SD 1999).

Cedar testified that there was affection between himself and Leslie at the time they started to work for Defendant Johnson at the Titan Bar and Grill in Fredrick on or about April, 2015. Cedar testified that he and Leslie raised cattle together, took weekend trips together, loved to hike, hunt agates together. Cedar testified that every night, not matter what happened or if we had a bad day, he and Leslie would always tell each other that they "loved each other" before they went to sleep. TT at 26 – 27.

Cedar also testified as to the content of seven exhibits, each exhibit reflecting some expression of love between Cedar and Leslie during their marriage, family harmony and affectionate private notes between the two. TT 34 – 40. Cedar also testified he and Leslie had an active, healthy sex life up and until the time Leslie moved out of the marital home. *Id* at 40.

Leslie, Cedar's spouse, testified that "I've always loved JC, don't get me wrong," when testifying about affection in her marriage to Cedar. Later Leslie described her feelings for Cedar as "It's weird. It was like a love/hate, hate/love. He –yeah. I don't know. I'm even confused on it myself…". *Id* at 96.

This testimony certainly creates a material issue of fact of whether Leslie had affection for Cedar before the affair. Thus, there is sufficient evidence for the jury to reasonably conclude that Cedar lost the affections of Leslie. See also *Rumpca v. Brenner*, 2012 S.D. 33, ¶ 10 -11 (From an examination of the entire record, we conclude that this conflicting evidence creates a genuine issue of material fact on whether Kellie had affection for her husband that Brenner could have alienated. These disagreements must be resolved by a jury.)

The trial court ruled correctly on this issue issue.

CONCLUSION

Both parties to this litigation live in Fredrick, South Dakota. According to the United States Census Bureau, the projected population of Fredrick for 2016 was 204 people. The per capita income for the town was $13,881, with 11.1% of families were living below the poverty line. *American FactFinder*. United States Census Bureau. Retrived 2008-01-31.

For a Plaintiff in this particular case to be mandated to testify to the value of the loss of his marriage – perhaps up to a million dollars as suggest by the trial judge would be at the very best foolish and senseless.

Cedar respectfully request the Supreme Court to reverse the trial Court and send the case back to the Fifth Judicial Circuit for a new trial on all issues.

Respectfully submitted this 18th day of April, 2018.

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Robert A. Christenson, Attorney for appellant, Jerry Cedar, hereby certifies on April 18, 2018, two (2) true and correct copies of Appellant's Brief were served by mailing, first class mail, upon:

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Appellant's Brief was electronically filed pursuant to SDCL 15-26C-1.

Dated this 18th day of April, 2018.

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The undersigned, Robert A. Christenson, attorney for Appellant, Jerry Cedar, hereby certifies that the forgoing Appellant's Reply Brief, complies with the type volume limitation as stated in SDCL 15-26A-66(b)(2). The number of words in said brief totals 2575 and the number of characters for the same totals 10,852 (no spaces).

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APPENDIX

Partial Transcript of Jury Trial