

Thomas v. Siddiqui

869 S.W.2d 740

Supreme Court of Missouri

January 25, 1994

Supreme Court of Missouri, En Banc. James L. THOMAS, Respondent, v. Jawed SIDDIQUI, Appellant. No. 75837. Jan. 25, 1994. Action was brought for criminal conversation and alienation of affection. The Circuit Court, Jefferson County, John L. Anderson, J., directed plaintiff's verdict on claim of criminal conversation, granted judgment notwithstanding verdict with respect to award of punitive damages, and entered judgment on jury's verdict for defendant on alienation of affection claim. Transfer was granted prior to opinion of Court of Appeals. The Supreme Court, Benton, J., held that tort of criminal conversation was thereby abolished. Remanded. Price, J., concurred in separate opinion, in which Covington, C.J., concurred. Robertson, J., dissented in separate opinion. Timothy J. Gallagher, St. Louis, for appellant. James L. Thomas, Waynesville, for respondent.

BENTON, Judge.

On June 12, 1990, James L. Thomas sued Jawed H. Siddiqui, alleging criminal conversation and alienation of affection. The trial court directed a plaintiff's verdict on the claim of criminal conversation; the jury then assessed \$1 in actual damages and \$50,000 in punitive damages. The circuit judge later granted a judgment notwithstanding the verdict, finding punitive damages not submissible. A defendant's verdict was returned on alienation of affection.

Both parties initially appealed. This Court granted transfer prior to the court of appeals' opinion. Rule 83.06. This Court later dismissed Thomas' appeal for procedural reasons, thus leaving stand the defendant's judgment on alienation of affection and the court's nullification of punitive damages for criminal conversation. This Court now reverses the judgment on actual damages and the underlying cause of action.

In the last two decades, state courts across America, citing myriad reasons, have been abolishing the common law tort of criminal conversation.[^]

Missouri courts have long recognized the tort of criminal conversation.[^] To recover under criminal conversation, the plaintiff must prove two elements: 1) an actual marriage; and 2) that the defendant had sexual intercourse with the plaintiff's spouse.[^] The only defense to such an action is consent or connivance by the plaintiff spouse.[^]

Citing two statutes, Thomas contends that criminal conversation is a statutorily-approved cause of action. Section 510.263.5 RSMo Supp.1987 lists eight causes of action - including criminal conversation - where a court is not required to credit a defendant for advance payment of punitive damages. Section 516.140 RSMo 1986 provides a two-year statute of limitations for nine causes of action, including criminal conversation. Contrary to Thomas' argument, these statutes do not make criminal conversation a statutory tort. These statutes merely acknowledge the existence of a common law action for criminal conversation.[^] Criminal conversation has always been a common law tort in Missouri.[^]

This Court has the authority to abolish common law torts.[^] "With the disappearance of the reason the thing disappears; when the reason for a rule of law fails, the rule fails."[^]

A possible reason for the tort of criminal conversation is to compensate the plaintiff for injuries caused by the adulterous defendant.[^] However, another remedy exists to compensate the plaintiff spouse: Conduct during the marriage - including adultery - is a factor that a court considers in dividing marital property after dissolution.[^] Also, the tort of alienation of affection - governed by a different set of legal

rules – has traditionally provided the plaintiff spouse with a possibility of compensation.[^]

Another purpose of criminal conversation might be to punish and deter the defendant.[^] From the earliest days of statehood, Missouri punished adultery as a crime. See, e.g., Crimes and Misdemeanors, § 77, Laws of Missouri 1825[^]. Criminal conversation is the civil counterpart to the criminal offense of adultery.[^] In Missouri, the General Assembly repealed the crime of adultery in 1979.[^] Decriminalizing the act constituting criminal conversation evidenced society’s intent no longer to punish adultery.[^]

Thomas contends that abolishing the tort of criminal conversation encourages adultery. To the extent that laws can discourage adultery, there are other disincentives. Adultery – along with a belief that it is intolerable to live with the adulterous spouse – is a ground for dissolution.[^]

This Court now abolishes the tort of criminal conversation in Missouri and reverses the judgment as to criminal conversation.

This case is remanded for proceedings consistent with this opinion.

PRICE, Judge, concurring.

I concur with the decision of the majority, excepting only the reference to the tort of alienation of affection. The reference implies our continued recognition of such a cause of action.

Many of the reasons that support abolishing the tort of criminal conversation also apply to alienation of affection. Hopefully, the idea of having a “property right” in another person is long since passed. While I agree that we should attempt to protect marriage and the family unit, I doubt that lawsuits for money serve that goal. More often than not such suits will only continue the pain and abuse the parties have already suffered.

Without the issue being raised, briefed, and before us, I believe it is poor jurisprudence to anticipate whether such a tort should continue in existence, or in what form it should continue.

ROBERTSON, Judge, dissenting.

I respectfully dissent.

Under the laws of Missouri, marriage is a “civil contract.” § 451.010, RSMo 1986. The relationship that results from the entry of two persons into such a contract is one that the state seeks to foster and preserve where possible because of the societal stability marriage lends.[^] Thus, the state permits dissolution of the marriage contract without reference to fault only where one of the parties to the marriage believes that “there remains no reasonable likelihood that the marriage can be preserved and therefore the marriage is irretrievably broken.” § 452.305, RSMo 1986.

Criminal conversation and alienation of affection are species of the tort genus interference with contract. To a degree not present in most other torts, however, criminal conversation and alienation of affection actions speak to the core moral concerns society wishes to claim for itself and foster in its members. One of the original foundations for these actions lay in a husband’s property rights in his wife. We no longer recognize that justification, nor should we. It does not follow, however, that no rationale for the causes of action exists.

Some apologists for the tort system argue that tort laws exist to provide incentives to channel human activity toward society's valued behaviors. "[O]ne primary purpose of legal systems is to modify human behavior, to induce at least some people to act in ways that they would not choose but for the pressure of legal incentives or disincentives." Charles J. Goetz, *Law and Economics*, 1 (1984). Though the efficacy of the sanction is subject to debate, criminal conversation and alienation of affection actions provide some economic incentive designed to channel human behavior toward preserving the sanctity of marriage.

In this case, the majority chooses to exercise its common law authority to abolish one of the common law's incentives focused on the marriage contract. Courts have long claimed the ability to adjust the common law's incentives and disincentives as the times require and, in that claim, have asserted prescience as to the requirements of the times. That the Court has that authority is beyond serious debate. For me, the more serious question in this case is not whether the Court can exercise that authority, but whether it should.

Our constitution separates the powers of government, leaving it to the political branches to assess the direction in which the popular moral compass points. By constitutional design, we judges are insulated from the ebb and flow of popular tides, responsive instead to the neutral dictates of the law. The people have no frequently exercisable power to remove us if they disagree with us; the voters are limited to expressions of satisfaction or dissatisfaction concerning us, and then only once every twelve years; no candidate runs against us, offering the voters competing policy choices to those we impose through our opinions. To presume that a majority of the members of this Court feels the pulse of the people and can speak for them on issues of morals and values is a nearly irresistible temptation. To succumb to that temptation, however, is to assume more than we have a right to assume either constitutionally or personally.

The decision to abolish either cause of action seems to me profoundly of the sort we generally leave to the political branches. Indeed, of the thirty-six states that have abolished criminal conversation, twenty-seven have done so by legislative decision.[^] Of the nine courts that have exercised their common law authority to abolish criminal conversation, four[^] relied on prior legislative or judicial decisions abolishing alienation of affection actions.[^] Of the remaining five, Kentucky abolished both criminal conversation and alienation of affection actions in a single judicial decision.[^] This record hardly seems a national groundswell for judicial intervention in this area.

Legend: ~ *matter omitted* ^ *citations omitted*

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