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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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SHELDON REYNOLDS, an individual, and BRICE BATES, an  
individual,

Appellants,

vs.

JANIE HENDRIX, an individual,

Respondent.

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BRIEF OF RESPONDENT

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**ORIGINAL**

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## **I. INTRODUCTION**

Sheldon Reynolds and Brice Bates filed suit against Janie Hendrix for the tort of outrage. Less than three weeks before trial, and the day before the hearing on Ms. Hendrix's summary judgment motion, Mr. Bates and Mr. Reynolds filed a motion to amend their complaints to add six new causes of action, including malicious alienation of the affections of a minor child. When their motion was denied, they argued that the tort of malicious alienation of the affections of a minor child was implied in their complaints. At trial, King County Superior Court William Downing refused to instruct the jury on this unplead claim. Mr. Reynolds and Mr. Bates now appeal.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Did the trial court err in granting summary judgment on Mr. Bates's case when (1) Mr. Bates failed to plead a claim for malicious alienation of the affections of a minor child, and (2) even if he had plead such a cause of action, he could not have recovered because the tort accrues to the parent, not the child?

Did the trial court err when it denied Mr. Reynolds's request to instruct the jury on a claim for malicious alienation of the affections of a minor child when: (1) Mr. Reynolds failed to plead such a claim, and (2) Mr. Reynolds failed to offer evidence at trial to support such a claim?

### III. STATEMENT OF THE CASE

Janie Hendrix is the sister of rock legend Jimi Hendrix, CP 991:1-12, and is the President and CEO of Experience Hendrix, LLC. RP2<sup>1</sup> 13:4-11. In this role, she oversees “everything that has to do with Jimi Hendrix.” RP3<sup>2</sup> 13:6-11.

Through her involvement in the music industry, Ms. Hendrix met Sheldon Reynolds. RP3 92:23-93:11. Mr. Reynolds is a professional musician who has played with a number of bands, including The Commodores and Earth Wind & Fire. RP3 82:22-83:10.

Ms. Hendrix and Mr. Reynolds married in 2001, RP2 13:12-16, and had what both parties describe as a “storybook” romance. RP3 94:24-95:1; RP4<sup>3</sup> 62:20-63:4. The story came to an unfortunate ending in 2007, when Ms. Hendrix and Mr. Reynolds divorced. RP2 13:16-17. The relationship ended on bitter terms, each party blaming the other for the marriage’s demise. RP3 118:20-119:2; RP4 62:10-64:19.

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<sup>1</sup> The transcripts from the summary judgment hearing and trial are not numbered in volumes. RP2 denotes the Verbatim Report of Proceedings from February 2, 2009.

<sup>2</sup> RP3 denotes the Verbatim Report of Proceedings from February 3, 2009.

<sup>3</sup> RP4 denotes the Verbatim Report of Proceedings from February 4, 2009.

Eight days after the divorce was final, Mr. Reynolds filed a lawsuit against Ms. Hendrix for the tort of outrage, demanding money damages. RP3 186:10-12.

Mr. Reynolds's outrage claim is based on the circumstances surrounding a paternity test he took during the course of his marriage to Ms. Hendrix. CP 3-4. Ms. Hendrix arranged for him to take the test to determine whether he was the biological father of a young man named Brice Bates. RP3 100:11-13; RP3 101:12-13.

Brice Bates was born on January 29, 1986, to Gina Bates, CP 824:19-20, a woman Mr. Reynolds met at an "after party" while playing for The Commodores. RP3 141:11-142:10. Other members of the Commodores told Mr. Reynolds that Ms. Bates was a "gold digger" and "a groupie." RP3 150:15-20; CP 1046:1-8. Nonetheless, Mr. Reynolds had sex with Ms. Bates several times. RP3 144:9-11; CP 1033:14-18. He cannot recall whether they used birth control during their liaisons. CP 1034:23-25; CP 1035:10-23.

As early as 1988, Ms. Bates called Mr. Reynolds and told him that she had given birth to a child named Brice, who was his son. RP3 148:5-9. Mr. Reynolds did not believe Ms. Bates and did not assume any parental responsibility for Brice. RP3 149:10-16; RP3 152:7-13.

In the years that followed, Ms. Bates contacted Mr. Reynolds on more than one occasion regarding his paternity of Brice, but Mr. Reynolds cannot recall how many conversations they had, nor can he recall the substance of those conversations. RP3 152:14-20; CP 1041:24-CP 1042:15. All he remembered was that he did not believe her and that “she said she would prove it, but she wouldn’t.” CP 1042:7-12.

For sixteen years, Mr. Reynolds took no action to confirm whether Brice Bates was his son. RP3 160:16-161:10; CP 1043:4-8. Mr. Reynolds was aware that scientific tests existed to determine paternity, but did not use any of these tests to find out if he was Brice’s father. RP3 160:25-161:10; CP 1051:17-CP 1052:4.

When Brice was seven years old, Ms. Bates told Brice that Mr. Reynolds was his father. RP3 57:17-19. Brice’s birthday wish was to meet his father, so, in 1994, Ms. Bates brought him to an Earth Wind & Fire concert in Dallas, Texas to meet Mr. Reynolds for the first time. RP3 57:23-58:17. When he met Brice at the side of the stage, Mr. Reynolds knew that Brice was the boy that Ms. Bates claimed was his son. RP3 154:14-19. Mr. Reynolds does not remember much else about the meeting, other than that Brice “probably came back stage.” CP 1057:20-22. After the meeting in Dallas, Mr. Reynolds contends that he was open to having a relationship with Brice but was not ready to acknowledge that

Brice was his son. CP 1058:25-1059:12. Despite his stated desire to have a relationship with Brice, two or three years went by before Mr. Reynolds saw Brice again. RP3 156:25-157:2.

Between 1995 and 2002, Mr. Reynolds saw Brice Bates once or twice. RP3 159:7-12. Mr. Reynolds cannot recall any of the details of these encounters with his son. RP3 159:13-15.

Mr. Reynolds married Janie Hendrix in 2001, when Brice Bates was 16. RP3 160:16-18. Up to that point in time, he had not taken a DNA test to determine paternity. RP3 160:16-24.

In 2002, Ms. Hendrix purchased a DNA test kit for Mr. Reynolds. RP3 162:11-16; RP3 164:19-22. Mr. Reynolds eventually took the kit to Dallas, TX, to simultaneously collect DNA samples from himself and Brice. RP3 165:18-21. When Mr. Reynolds returned from Texas, he gave the swabs to Ms. Hendrix. RP3 166:15-18. She paid to send the swabs to the laboratory. RP3 166:19-25.

There was a delay before the results arrived. RP3 167:5-7. According to Mr. Reynolds, he does not recall contacting the lab during this time, but received something in the mail apologizing for the delay. RP3 103:16-21. Ms. Hendrix testified that Mr. Reynolds called the lab directly to inquire about the delay and was told that the test had been lost. RP2 25:20-21. The lab requested that he submit new DNA samples, and

Mr. Reynolds told him that this was impossible because Brice lived in another state. RP2 26:4-7. The lab employee on the phone asked Mr. Reynolds a number of questions about himself and Brice. RP2 26:8-10. Shortly after this phone call, the test results arrived in the mail. RP2 26:10-12.

When the DNA test results arrived, Mr. Reynolds picked them up at the post office. RP3 167:13-15. Mr. Reynolds admits that Ms. Hendrix was not monitoring the mailbox, nor did she attempt to intercept the results. RP3 168:10-17. In fact, on the day the results arrived, Ms. Hendrix requested that Mr. Reynolds pick up the mail at the post office as a favor to her. RP3 104:13-15. Mr. Reynolds himself opened the envelope and pulled out the results. RP3 104:21-22. He said that the results looked like “a foreign language,” RP3 105:1, although he admits that they were, in fact, written in English. RP3 169:4-5.

Mr. Reynolds and Ms. Hendrix disagree about what happened next. According to Mr. Reynolds:

[Ms. Hendrix] looked at it as I sat back down and said, well, I’m not sure what it says here, but I think it says no. But let me have it checked out.

RP3 105:8-11. Mr. Reynolds claims that Ms. Hendrix called him later that day on the phone and told him that Brice Bates was not his son. RP3 105:22-106:1. He claims to have relied on her to figure it out for him

because, during their marriage, Ms. Hendrix had handled two lawsuits against the Jimi Hendrix estate that involved DNA tests. RP2 51:22-52:1; RP3 101:19-102:4. Mr. Reynolds admits, however, that he did not know whether Ms. Hendrix could interpret the test results herself. RP3 163:25-164:3. He also admits that she never represented to him that she could interpret them. RP3 164:16-18.

Ms. Hendrix testified that, when she and Mr. Reynolds reviewed the results, he told her that they “looked Chinese to him.” RP2 29:15-16. She told Mr. Reynolds that she did not have time to look at them and put the results back in the envelope. RP2 29:16-20. Later, when she thumbed through them:

I saw a lot of numbers and it was quite confusing to try and read through numbers...And then anyways I had just put the papers back in the envelope and brought them home and handed it to him. And I said it's very confusing I don't know what they say so perhaps like you called the lab before to have them find [the test], then you can call them and ask them to help you determine what these results say.

...

When I brought [the results] back to him and told him to call the lab, he said, well, if you don't think he's my child, then, you know, he's not. And I said, no. No, I didn't say that he wasn't your child. I said you should call the lab...And he just put the envelope aside and he didn't talk about it anymore.

RP2 30:5-15; RP2 31:18-24.

Mr. Reynolds admits that he did not call the lab himself, RP3 168:10-12, nor did he take the results to any of his many friends in the medical field for interpretation. RP3 167:20-168:2. He also admitted that he was not disappointed to learn that the test result was negative. RP3 170:20-25.

Upon receiving the news, Mr. Reynolds claims that he tried to call Brice to relay the results, but that the number he had for Gina Bates was no longer working. RP3 171:7-12. Mr. Reynolds had Brice's address, but did not send him any correspondence. RP3 172:2-23. He made no further attempt to contact Brice. RP3 106:21-23.

Approximately three years later, in the spring of 2006, Ms. Hendrix ended her relationship with Mr. Reynolds. RP3 112:15-19. The break-up was contentious. RP3 112:24-113:9; RP3 118:20-119:2; RP4 62:10-64:19. Several months later, in July of 2006, Brice Bates contacted Mr. Reynolds via email. RP3 25:13-27:8; RP3 182:11-16. Mr. Reynolds suggested that they re-take the DNA test. RP3 28:22-25.

Mr. Reynolds spoke with "some friends in the medical field" to find a place he could trust to perform a second DNA test. RP3 181:20-22. Mr. Reynolds obtained a DNA kit and overnighted it to Brice. RP3 182:11-16; RP3 29:10-22. Results came back within a week or so, RP3 183:17-23, and when Mr. Reynolds read the results: "...I thought I was

seeing that he was my son, and I still wasn't sure because it was too good to be true, and I just decided to call them before I get excited about this." CP 51, 84:7-10. A telephone call with "a real nice lady" at the lab finally confirmed for Mr. Reynolds that Brice Bates was indeed his son. CP 51, 84:11-13.

Ms. Hendrix's divorce from Mr. Reynolds was finalized on July 31, 2007. RP3 186:7-11. Plaintiffs' counsel in this case, Amanda DuBois, also represented Mr. Reynolds in the divorce proceedings. RP3 186:25-187:2.

On August 8, 2007, eight days after the divorce was finalized, Mr. Reynolds and Brice Bates filed separate complaints alleging the tort of outrage against Hendrix. CP 3-5; CP 12-14; RP3 186:7-12. The tort of outrage was the only claim alleged by either plaintiff. CP 3-5; CP 12-14.

Nearly six months later, on January 24, 2008, the plaintiffs filed separate Confirmations of Joinder stipulating that "No further claims or defenses will be raised." CP 1245.

In the fifteen months between the filing of the complaint and the discovery cut-off date, neither Mr. Reynolds nor Mr. Bates conducted any discovery at all. CP 269:17-24. On December 15, 2008, one week after discovery cutoff, they deposed Ms. Hendrix. CP 619.

Ms. Hendrix filed a Motion for Summary Judgment on December 5, 2008. CP 19. The hearing on the Motion for Summary Judgment was originally scheduled for January 2, 2009. *Id.* However, Mr. Reynolds and Mr. Bates failed to file their response until December 30, 2008, three days before the hearing. CP 61. The hearing on the Motion for Summary Judgment was thus delayed until January 9, 2009. RP1<sup>4</sup> 1.

The day before the hearing and with less than three weeks remaining before trial, Mr. Bates and Mr. Reynolds filed a motion to amend their complaints. CP 234. The motion to amend attempted to add six new theories of liability, including malicious alienation of the affections of a minor child.<sup>5</sup> CP 234-241.

The motion for summary judgment was heard the following day. RP1 21-66. The court denied Ms. Hendrix's motion for summary judgment on Mr. Reynolds's claims and granted it on Brice's claims. RP1

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<sup>4</sup> RP1 denotes the Transcript of Proceedings from January 9, 2009.

<sup>5</sup> The motion sought to add the tort of "custodial interference." Later, at trial, Mr. Reynolds's counsel referred to the tort as "gross interference with a parental relationship." On appeal, Mr. Reynolds calls the tort "malicious interference with the parent-child relationship." The relevant case law refers to the tort as "malicious alienation of the affections of a minor child." *See Strode v. Gleason*, 9 Wn. App. 13, 20, 510 P.2d 250 (1973).

65:16-18; CP 253-254. It did not decide the motion to amend at that time.  
RP1 65:21-66:8.

The motion to amend was heard on January 19, 2009, two weeks before trial. CP 503. The court denied the motion. *Id.*

The following day, Mr. Bates moved for reconsideration of the order granting summary judgment on his claims, arguing that the court should have dismissed his outrage claim only and allowed him to proceed to trial on the other, unnamed causes of action allegedly raised in his complaint. CP 285-296. The court denied his motion, holding that the tort of outrage “was the only cause of action contained in the complaint.” CP 618 (emphasis in original).

Mr. Reynolds’s outrage claim proceeded to trial before King County Superior Court Judge William Downing on February 2, 2009. RP2 1. Mr. Reynolds requested a jury instructions on the tort of “gross interference with a parental relationship” pursuant to an unpublished case, on his constitutional right to a relationship with his son under *Troxell v. Grandville*, 530 U.S. 57 (2000), as well as on Mr. Bates’s constitutional right to an accurate determination of paternity under *In re Parentage of Calcaterra*, 114 Wn. App. 127, 56 P.3d 1003 (2002). RP4 51:20-53:20. Judge Downing refused to instruct the jury on these claims, noting that:

In order to have a violation of a constitutional interest, you need to have a state action. The allegation here is simply private action by Ms. Hendrix, so people have to talk about, well, you denied him my constitutional rights, but, really, that can't happen in a private context. That is only something that is occasioned by state action.

RP4 53:21-54:22.

Judge Downing ruled, however, that Mr. Reynolds could argue that the loss he sustained as a result of the alleged outrageous conduct was the deprivation of a relationship with his son:

Here, I think what's being talked about and what certainly you will argue to the jury is something, if I may say with all due respect to the Supreme Court, something larger than the Supreme Court and the US Constitution, and that's the natural law, the laws of nature, the laws of nature as God, if you will, that define the parent-child and family relationship. That is really what is alleged to be the loss that was suffered in this case, not the deprivation of a constitutional right or something written in on a dry piece of paper somewhere.

So, that's why I --

MR. SANDERS: If I made reply for the record?

THE COURT: -- I don't intend to instruct on that.

RP4 54:6-22.

Mr. Reynolds offered no evidence at trial as to the content of the original DNA test results.<sup>6</sup> He was unable thus to prove whether the results Ms. Hendrix allegedly interpreted were negative, positive, or inconclusive.

The jury returned a verdict for Ms. Hendrix. CP 1247. Mr. Bates and Mr. Reynolds now appeal. Neither Mr. Bates nor Mr. Reynolds has assigned error as to the trial court's denial of their motion to amend, nor has Mr. Bates assigned error to the summary judgment dismissal of his outrage claim. Brief of Appellants, p. 1. Rather, their assignments of error on appeal relate to the trial court's refusal to interpret their complaints to include a claim for "malicious interference with the parent child relationship," which is referred to by the applicable case law as the tort of malicious alienation of the affections of a minor child. Mr. Bates and Mr. Reynolds admit that this tort was not "specifically delineated" in their complaints. *Id.* at pp. 1, 6. Mr. Reynolds also assigns error to Judge Downing's refusal to instruct the jury on this unplead claim. *Id.* at 1.

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<sup>6</sup> Mr. Reynolds claims that Ms. Hendrix was last in possession of the test results. RP3 117:21-23. Ms. Hendrix claims that Mr. Reynolds was. RP2 46:3-10. In any event, the results were not submitted as evidence at trial.

#### **IV. SUMMARY OF THE ARGUMENT**

Although they admit that their complaints “specifically delineated” a claim for only one tort, Mr. Reynolds and Mr. Bates are disgruntled that the trial court did not allow them to allege six new causes of action on the eve of trial in response to summary judgment. While it is possible that in many situations, additional, complementary legal theories may legitimately develop in a case over the course of discovery, this is not one of those cases.

While this case was pending trial, Mr. Reynolds and Mr. Bates conducted no discovery. When the discovery cutoff passed and Ms. Hendrix filed her summary judgment motion, Mr. Reynolds and Mr. Bates frantically took Ms. Hendrix’s deposition and fashioned several new legal theories in an attempt to salvage their lawsuit.

Ms. Hendrix, on the other hand, seasonably prepared her case and readied her defense. She properly moved for summary judgment within the appropriate time frame. Caught unprepared, the two plaintiffs crossed their fingers and threw a hail mary pass. Encouraging the trial court to read between the lines, they insisted that if the court looked at the complaint just right, it would see what they saw: several new, viable—and heretofore unmentioned—causes of action to replace the ones they feared would disappear in the face of summary judgment.

Notice pleading under CR 8 was not designed to encourage last-minute legal gymnastics or to allow a procrastinating plaintiff to spring new causes of action on the unwary defendant. To read CR 8 as condoning such a practice would defeat the equitable principles that form its foundation and warp the rule beyond what justice can tolerate. The trial court properly declined Mr. Reynolds and Mr. Bates's invitation to do so and refused to reward their procrastination.

Even if Mr. Reynolds had properly plead a cause of action for malicious alienation of the affections of a minor child, he did not and cannot prove the elements of the tort. He and Mr. Bates had no relationship to speak of before Ms. Hendrix's allegedly malicious conduct occurred. When Mr. Bates learned of Ms. Hendrix's actions—four years after the fact—he was no longer a minor child. His affection for Mr. Reynolds did not change. Mr. Bates labored under the misimpression that Mr. Reynolds was not his biological father for approximately one week, during which he and Mr. Reynolds had more of a relationship than they had at any point in the past.

Likewise, Mr. Bates is similarly unable to prove a claim for malicious alienation of the affections of a minor child. The tort has never been recognized as accruing to the child; it has only ever applied to claims by parents. *See Waller v. State*, 64 Wn. App. 318, 338, 824 P.2d 1225

(1992); *Babcock v. State*, 112 Wn.2d 83, 768 P.2d 481 (1989); *Spurrell v. Bloch*, 40 Wn. App 854, 867, 701 P.2d 529 (1985); *Strode v. Gleason*, 9 Wn. App. 13, 510 P.2d 250 (1973). This makes sense, because Washington law disfavors alienation of affection claims as to adults. See *Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980). Therefore, even if Mr. Bates had plead a claim for malicious alienation of the affections of a minor child, it would not have provided him with a viable tort claim.

## V. ARGUMENT

### A. Standard of review.

#### 1. A de novo standard of review applies to a trial court's refusal to instruct the jury on an unplead claim.

A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286, 288 (2009). If the trial court must draw a legal conclusion to determine whether to give an instruction, the de novo standard of review applies. *Id.* In this case, the trial court was required to decide, as a matter of law, whether the allegations set forth in Mr. Reynolds's complaint were sufficient under CR 8 to plead a cause of action for malicious alienation of the affections of a minor child, and thus warrant an instruction to the jury on this claim. The decision not to instruct the jury as to the tort of

malicious alienation of the affections of a minor child, therefore, is subject to a de novo standard of review.

**2. An abuse of discretion standard of review applies to a decision declining to interpret a complaint to include unplead claims.**

Although the standard of review of an order granting summary judgment is de novo, the issue on appeal is not the court's decision on summary judgment. The court's summary judgment order pertained only to the plead claims of outrage, to which neither Mr. Reynolds nor Mr. Bates assigned error. The issue on appeal, rather, is whether the trial court should have interpreted the complaints to allege a cause of action for malicious alienation of the affections of a minor child. The appropriate standard of review of such a decision is abuse of discretion. *See Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 857, 22 P.3d 804 (2001).

In *Saluteen-Maschersky*, the plaintiff raised new causes of action in response to the defendant's motion for summary judgment. The defendant responded with a motion to strike these claims, which the trial court granted. On appeal, the court applied an abuse of discretion standard when reviewing the trial court's order striking the new claims and affirmed the trial court, holding that the complaint did not provide fair notice of the claims.

Similarly, in our case, Mr. Reynolds and Mr. Bates failed to plead or otherwise raise the claim of malicious alienation of the affections of a minor child until their opposition to Ms. Hendrix's motion for summary judgment. Although Ms. Hendrix did not file a separate motion to strike, she made the same argument that the plaintiff in *Saluteen-Maschersky* did: that the court should refuse to recognize the plaintiffs' new, unplead claims because they were not properly alleged in the complaint. The abuse of discretion standard applied in *Saluteen-Maschersky* is thus the same standard of review that is applicable here. The trial court's decision in our case should not be disturbed, therefore, unless it was "based on untenable grounds or untenable reasons." *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009).

**B. Neither Mr. Reynolds nor Mr. Bates plead a cause of action for malicious alienation of the affections of a minor child.**

Mr. Reynolds and Mr. Bates filed similar complaints, both of which mention one tort, and one tort only: outrage. They argue, nonetheless, that their complaints can be construed to contain a claim for malicious alienation of the affections of a minor child. Neither complaint alleges that Mr. Reynolds and Mr. Bates had a family relationship, that their existing family relationship was affected by Ms. Hendrix's alleged representations regarding paternity, or that Mr. Bates lost affection for Mr.

Reynolds. Their complaints thus do not put Ms. Hendrix on notice that they were litigating a claim for alienation of the affections of a minor child and cannot, therefore, be construed as satisfying CR 8.

Clinging to the liberal interpretation of CR 8, many a plaintiff has divined new causes of action from their complaint to keep their lawsuit afloat on the eve of summary judgment. This tactic of springing new legal theories on the unwary defendant is inequitable and disfavored in Washington State. Courts facing such behavior by plaintiffs have refused, time and again, to distort CR 8 to reward such last-minute lawyering.

In *Pacific Northwest Shooting Association v. Sequim*, 158 Wn.2d 342, 144 P.3d 276 (2006), for example, the plaintiff alleged a cause of action against the city for interfering in its contractual relationship with the city. When the city moved for summary judgment on this claim, arguing that it could not be liable for interfering with its own contract, the plaintiff urged the court to interpret its complaint as alleging a cause of action against the city for interfering with its business expectancies with its vendors and the general public. *Id.* at 351. The trial court refused to recognize such a cause of action because the plaintiff had not made any reference to it prior to summary judgment, and because the complaint did not describe any specific relationships between the plaintiff and identifiable third parties. *Id.* at 352-53.

The circumstances at issue in our case are just like those at issue in *Pacific Northwest Shooting Association*. In our case, Mr. Reynolds and Mr. Bates failed to make any reference to a cause of action for malicious alienation of the affections of a minor child in the complaint. In fact, they failed to mention such a cause of action at all until they were staring down the barrel of summary judgment. At that point, they argued that the complaint should be interpreted to contain a claim for alienation of affections even though it made no reference to an existing relationship between Mr. Reynolds and Mr. Bates, nor did it allege that any affection was lost. The trial court thus ruled on the motion for summary judgment as to the only properly plead claim—outrage—and refused to recognize the existence of any other claims. Its dismissal of Mr. Bates’s lawsuit was not error.

Similarly, in *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004), the plaintiff sued the city for discrimination based on age and disability. When the city moved for summary judgment on these claims, the plaintiff argued that he had a claim for violation of his First Amendment rights as well. *Id.* at 469. The trial court refused to recognize a First Amendment claim because it had not been plead, and dismissed the plaintiff’s claims on summary judgment. The Court of Appeals affirmed, noting that although the plaintiff’s complaint referenced “constitutional

tort claims,” he did not raise his First Amendment claim until his memorandum in opposition to summary judgment. In so holding, the Court explained:

The variation among potential constitutional tort claims is significant. As the City argued at summary judgment, this variation presented myriad ways of proceeding with a defense and conducting discovery, resulting in actual prejudice to the City. The City should not be required to guess against which claims they will have to defend.

*Id.* at 470. Nor should Ms. Hendrix be required to guess against which torts arise out of the scant facts plead by the plaintiffs here. She prepared her defense based on the tort alleged by Mr. Reynolds and Mr. Bates, and moved for summary judgment accordingly. Had she been aware that she would also be required to defend a cause of action for alienation of the affections of a minor child, she could have submitted additional evidence and conducted additional discovery regarding the parties’ lack of an existing family relationship and obtained summary judgment on that claim as well.

Likewise, in *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), the plaintiff brought suit for negligence and breach of contract. The defendant moved for summary judgment, which the trial court denied. On appeal, the plaintiff attempted to shore up his case by urging the court to read the complaint to contain an additional cause of action for violation

of the Consumer Protection Act (CPA). The Washington State Supreme Court declined to recognize this claim, holding:

[A] litigant must plead more than general facts in a complaint to properly allege a CPA cause of action. If no reference is required to the CPA, a litigant would not have to amend their complaint to assert a violation. If this were the rule, a litigant could simply await trial and surprise their adversary with a CPA claim so long as enough facts were intermixed in the complaint. In hindsight it is easy to view facts and agree they support a CPA claim. It is much more difficult, if not an impossible task, to predict whether a plaintiff will raise such a claim when it is not alleged in the complaint.

*Id.* at 846.

Mr. Reynolds and Mr. Bates make a similar argument. They argue that facts alleged in the complaint, viewed in hindsight, give rise to a cause of action for malicious alienation of the affections of a minor child. Even if this were true, Ms. Hendrix should not be tasked with predicting which causes of action will strike the plaintiffs' fancy. Mr. Reynolds and Mr. Bates dallied in announcing their additional legal theories until a few weeks before trial. The trial court correctly declined to recognize these theories.

In a case also involving a complaint with a singular claim for outrage, the court in *Lewis v. Bell*, 45 Wn. App. 192, 724 P.2d 425 (1986), refused to recognize additional unplead torts arising out of the set of facts alleged in the complaint. The plaintiff in *Lewis* was the foster parent of

the Bell's child. *Id.* at 193. Upon learning that his child had been injured while in the Lewis's care, Bell entered the basement of Lewis's home. *Id.* Lewis alleged that Bell scuffled with the other foster children and tried to push his way into the kitchen, causing her to faint. *Id.* at 194.

Lewis filed suit against Bell for outrage. *Id.* Bell moved for summary judgment, and the court granted the motion. *Id.* at 192. On appeal, Lewis argued that summary judgment should not have been granted because she had a cause of action for assault as well. *Id.* at 196-97. The Court of Appeals refused to consider Lewis's assault claim, holding:

Although inexpert pleading has been allowed under the civil rule, insufficient pleading has not. A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests. Because the Lewises based their claim for relief solely on the tort of outrage, it cannot be said that the court or the Bells were put on notice that relief was being sought for an alleged tortious assault.

*Id.* at 197 (internal cites omitted). Our case involves strikingly similar facts. Mr. Reynolds and Mr. Bates plead one claim, and one claim alone. They did not put Ms. Hendrix or the court on notice, in their complaints or otherwise, that additional torts were at issue. Trial court did not err, therefore, in limiting the case to the tort of outrage only.

**C. Judge Downing correctly declined to instruct the jury on the tort of malicious alienation of the affections of a minor child because Mr. Reynolds did not and cannot prove the elements of the tort.**

Prior to 2006, Mr. Reynolds had made no effort to have any type of parent-child relationship with Mr. Bates. He did not acknowledge Mr. Bates as his son, and testified that he was not disappointed when Ms. Hendrix allegedly told him that the paternity test concluded that he was not Mr. Bates's father. Mr. Bates had no knowledge of Ms. Hendrix's alleged statements to this effect until days before he and Mr. Reynolds took a second test confirming paternity. Upon these facts, a cause of action for interference in Mr. Reynolds's relationship with Mr. Bates cannot lie.

The tort at issue in this case is typically referred to as malicious alienation of the affections of a minor child.<sup>7</sup> The elements of the tort are as follows:

1. An existing family relationship;
2. A malicious interference with the relationship by a third person;

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<sup>7</sup> The case law also refers to the tort as "custodial interference," *Spurrell v. Bloch*, 40 Wn. App 854, 867, 701 P.2d 529 (1985), and "malicious interference with the parent child relationship," *Waller v. State*, 64 Wn. App. 318, 338, 824 P.2d 1225 (1992).

3. An intention on the part of the third person that such malicious interference results in a loss of affection or family association;

4. A casual connection between the third parties' conduct and the loss of affection; and

5. Damages.

*Strode v. Gleason*, 9 Wn. App. 13, 20, 510 P.2d 250 (1973). Mr. Reynolds did not offer evidence at trial to establish the first element, that he and Mr. Bates had an existing relationship, nor did he offer evidence of the fourth element, that Ms. Hendrix's conduct caused Mr. Bates to lose affection for him. Judge Downing was correct, therefore, in declining to instruct the jury on the tort of alienation of affections of a minor child.

**1. The tort of alienation of the affections of a minor child requires that a relationship exist between the parent and child.**

Mr. Reynolds had no relationship with his son prior to 2006, and he alone is to blame for it. Over the course of Mr. Bates's childhood, Gina Bates told Mr. Reynolds repeatedly that Mr. Bates was his son. Mr. Reynolds did nothing to settle the question of paternity, nor did he pursue a relationship with Mr. Bates. His failure to parent his son is due to his own willful ignorance, and not the result of an evil scheme by Ms. Hendrix.

Even if we assume that Mr. Reynolds's allegations as to Ms. Hendrix's representations regarding the paternity test are true, Ms. Hendrix's alleged conduct did nothing to impact the relationship—or lack thereof—between Mr. Reynolds and Mr. Bates. Up to 2002, the two had only sporadic contact, separated by years of distance. The lapse in contact between 2002 and 2006 was typical of their relationship.

Mr. Reynolds's argument on appeal assumes that the “relationship” element of the tort is satisfied simply by showing a genetic link. It is the family relationship that is subject to interference by a third person, not the genetic relationship. Mr. Reynolds and Mr. Bates did not have any family relationship with which to interfere.

The case law clearly contemplates a personal relationship, not merely a biological one. The court in *Strode v. Gleason*, 9 Wn. App. 13, for example, described the tort as a “cause of action for damages against a third person who spitefully alienated the affections of a minor child or maliciously interferes with the family relationship resulting in a loss of the child's affections.” *Id.* at 18. Shared DNA does not create a parental relationship. This fact is recognized time and again in the law. For example, parental rights can be terminated if a parent “fail[s] to perform parental duties under circumstances showing a substantial lack of regard

for his parental obligations.” RCW 26.33.120. Case law defines “parental obligations as entailing the following minimum attributes:

- (1) Express love and affection for the child;
- (2) Express personal concern over the health, education, and general well-being of the child;
- (3) The duty to supply the necessary food, clothing, and medical care;
- (4) The duty to provide an adequate domicile; and
- (5) The duty to furnish social and religious guidance.

*In re Pawling*, 101 Wn.2d 392, 679 P.2d 916 (1984). A mere biological link between parent and child thus does not create a de facto family relationship. Being a parent involves years of care, worry, and sacrifice. Shared DNA makes a father no more than lack of a genetic link breaks one. Mr. Reynolds’s attitude toward Mr. Bates between 1986 and 2006 shows nothing of the rights and obligations of being a parent. He cared so little about determining paternity that he waited until 2002 to take a test, and only then at Ms. Hendrix’s suggestion. He could not be bothered to purchase the test, mail the results, or call the lab to explain them, but now laments the years he missed with his son. A “parent” such as Mr. Reynolds has no right of action for malicious alienation of the affections of his child. He has only himself to blame.

**2. The tort of malicious alienation of the affections of a minor child requires an adverse impact on the child's affections toward the parent, which did not occur in this case.**

Mr. Reynolds did not relay the results of the first paternity test to Mr. Bates, even though he admittedly had Mr. Bates's address and had previously sent mail to him. Because Mr. Bates knew nothing about the results of the paternity test, his affections toward Mr. Reynolds could not possibly have been affected by any representations made by Ms. Hendrix regarding the results.

In fact, Mr. Bates spent a great deal of time and money between 2002 and 2006 trying to track down Mr. Reynolds, whom he still believed to be his father. When he finally found Mr. Reynolds through MySpace in 2006, he wrote Mr. Reynolds this message:

It's been so long that I'm in tears that I have a way to talk to you. Father, I need you in my life and my grandmother and I have spent lots of money trying to find you. There is so much I want to tell you and so much time I want to spend with you. If you never knew, you now know that I love you. Give me a chance to let you know the man I am now. I know you will be proud, but I still have so much to learn. I am at my grandmother's house in Mansfield. Will you call me? [...] Your son, Brice.

RP3 26:19-27:3; CP 1002. Mr. Reynolds called the next day, and although Mr. Reynolds told Mr. Bates that the results of the first paternity test were negative, Mr. Reynolds also stated that he wanted to take another

test. RP3 27:9-28:3. Only a week passed between this conversation and the arrival of the results of the second test, confirming paternity. RP3 29:5-9. During that week, he and Mr. Bates spoke at length on the phone about their lives. RP3 28:13-22. The two had more of a relationship at that point in time than they had at any point in the past. Mr. Reynolds thus cannot and did not prove that Ms. Hendrix's actions impacted Mr. Bates's affection for Mr. Reynolds in any way. The fact that Mr. Reynolds did not receive Mr. Bates's affection between 2002 and 2006 is a direct result of Mr. Reynolds's continued lack of interest in Mr. Bates, and not the result in any change of sentiment by Mr. Bates.

Recovery was denied under analogous circumstances in *Spurrell v. Bloch*, 40 Wn. App. 854, 701 P.2d 529 (1985). In *Spurrell*, the parent sued the school district, the Department of Social and Health Services, the State, and various other parties, asserting that those parties unlawfully interfered with the parents' custody when they removed the Spurrells' children from the parents' home for a period of approximately 30 hours. *Id.* at 857-59. Characterizing the plaintiffs' claim as one for alienation of affections of a minor child, the *Spurrell* court held that dismissal of the claim was proper because there was no allegation of lost affections. *Id.* at 867-68.

The same situation occurred in this case. For approximately one week, Mr. Bates was under the impression that the results of the first paternity test were negative. RP3 29:5-9. But he was also aware that there was at least some question as to the validity of the results, given the fact that Mr. Reynolds wanted to re-take the test. No affection between the two was lost. Although Mr. Bates was reportedly disappointed to learn that the results of the first test were negative, he did not testify that his feelings toward Mr. Reynolds had changed in any way. RP3 27:3-29:7.

**3. If any impact to the relationship occurred, it would have occurred after Mr. Bates reached the age of majority.**

Even if Mr. Reynolds could establish that Mr. Bates's affections toward him waned during that one-week period, however, his cause of action would still fail because by the time Mr. Bates learned about the results of the first paternity test, he was no longer a minor child. Clearly, a cause of action for malicious alienation of the affections of a minor child cannot lie if the child at issue is not a minor.<sup>8</sup> Mr. Bates was 20 years old when he and Mr. Reynolds resumed contact in 2006. Mr. Reynolds failed, therefore, to present evidence to support a cause of action for alienation of

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<sup>8</sup> Causes of action for alienation of the affections of an adult are disfavored in Washington. *See Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980), abolishing the tort of alienation of the affections of a spouse.

affections at trial, and Judge Downing correctly declined to instruct the jury on it.

**4. Mr. Reynolds did not prove that Ms. Hendrix maliciously interfered in his relationship with Mr. Bates because he did not prove that she misrepresented the test results.**

The act of malicious interference upon which Mr. Reynolds bases his claim is Ms. Hendrix's alleged statement to him that the result of the first paternity test was negative. He admits, however, that he could not read the test results himself and offered no evidence at trial as to what the test results were. He failed to prove, therefore, that Ms. Hendrix's alleged statements regarding the test results were untrue. Without evidence that Ms. Hendrix misrepresented the test results, he has no viable claim under any theory in tort against her.

**D. Mr. Bates is also unable to prove a claim for malicious alienation of the affections of a minor child because the cause of action accrues to the parent only.**

Even if Mr. Bates had properly plead a cause of action for malicious alienation of the affections of a child, the cause of action accrues to the parent only. Not a single Washington case recognizes this

cause of action to provide a right of recovery for the child.<sup>9</sup> Because the trend in Washington law goes against the recognition of causes of action for the alienation of affections of an adult, *see, e.g., Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980), this court should decline to extend existing case law to include a right of action for the malicious alienation of the affections of a parent.

## VI. CONCLUSION

Therefore, for the reasons set forth above, this court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of December, 2009.



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<sup>9</sup> In *Strode v. Gleason*, the court discusses in dicta the merits of recognizing a cause of action for the alienation of affections of a parent. *Strode*, 9 Wn. App. at 18-19. The *Strode* case was decided seven years before *Wyman v. Wallace*, which abolished the cause of action for alienation of affections of a spouse. Restatement (Second) of Torts § 702A explicitly disaffirms such a cause of action.