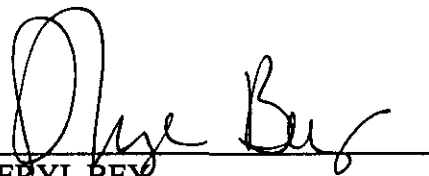


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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Homer D. Thompson, III;
2. Jeffrey M. Navarro;
3. Stephen M. Brown;
4. True Temper Sport, Inc. a/k/a True Temper Corporation;
5. Sheryl Bey; and
6. Kirk D. Tharp.



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## **COUNTER-STATEMENT OF THE ISSUES**

- I. Whether the circuit court correctly granted True Temper's Motion to Dismiss Plaintiff's complaint for failure to state a claim for alienation of affections.
- II. Whether the circuit court correctly granted True Temper's Motion to Dismiss the claims of vicarious liability asserted against it for its employees' extra-marital affair.

## **COUNTER-STATEMENT OF THE CASE**

Homer D. Thompson, III ("Thompson") filed suit for the alienation of his wife's ("Barbara") affections against her paramour, Stephen M. Brown ("Brown"), and her employer, True Temper Sport, Inc ("True Temper"). (R. pp. 7-21) True Temper filed an answer (R. pp. 33-41) and a Motion to Dismiss for failure to state a cause of action upon which relief can be granted pursuant to Miss. Rule Civ. Pro. 12(b)(6). (R. pp. 42-50) Following a hearing, the Circuit Court of Lee County, Mississippi granted True Temper's motion and dismissed appellant's claims against it. (R. pp. 72-76) After the court denied Thompson's motion to alter or amend the judgment, he timely appealed the circuit court's ruling.

## **COUNTER-STATEMENT OF RELEVANT FACTS**

The only relevant and ultimately dispositive facts are that True Temper is a corporate entity that did not intentionally and actively interfere with Barbara's marriage and Brown was on a frolic of his own.

True Temper is a corporate entity that owns and operates a manufacturing plant in Amory, Mississippi, where it employed Brown as Vice President of Human Resources and Barbara as its Human Resources/Safety Assistant. Thompson alleges that Brown and Barbara are having an affair and he contends that True Temper is directly liable to him for the loss of Barbara's consortium because it "permitted an atmosphere engendering the development" of an

affair. (R. p. 15<sup>1</sup>) However, Thompson does not describe conduct by True Temper that could even plausibly support the inference that it actively interfered in Barbara's marriage. Because True Temper did not intentionally alienate Barbara's affections it is not liable to Thompson. Further, as Brown's employer, True Temper is not vicariously liable for Brown's conduct because it was not within the scope of Brown's employment.

### **STANDARD OF REVIEW**

Motions to dismiss under Mississippi Rule of Civil Procedure 12 raise questions of law and are reviewed de novo. *Hartford Cas. Ins.Co. v. Halliburton Co.*, 826 So. 2d 1206, 1209-10 (Miss. 2001). Rule 12(b)(6) tests the legal sufficiency of a complaint, and provides that dismissal shall be granted to the moving party where the plaintiff has failed to state a claim upon which relief can be granted. *Chalk v. Bertholf*, 980 So. 2d 290, 293 (Miss. Ct. App. 2007). In applying this rule, a motion to dismiss should be granted if the complaint is legally deficient on its face to state a claim. *Id.*

### **SUMMARY OF THE ARGUMENT**

A disgruntled spouse cannot pursue a claim for alienation of affections against his wife's employer for his wife's affair without describing conduct by the employer that shows how it actively interfered in the marriage. Further, a cuckold cannot, as a matter of law, hold the paramour's employer vicariously liable for the paramour's conduct because it is outside the scope of his employment duties.

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<sup>1</sup> True Temper's Record Excerpt.

## ARGUMENT

### 1. **The Circuit Court Correctly Granted True Temper's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim for Alienation of Affections Against it**

Mississippi Rule of Civil Procedure 8 establishes the general rules of pleading and only requires "a short and plain statement of the claim showing the pleader is entitled to relief." *Accord* Fed. Rule Civ. Proc. 8(a)(2) ("a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief"). In construing the Mississippi Rules of Civil Procedure, the Mississippi Supreme Court looks for guidance to the federal cases, since the Mississippi Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure. *Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d 427, 432 (Miss. 2007). The pleading standard of Rule 8 does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2008). Similarly, although Miss. R. Civ. Pro. 8 was intended to lessen the pleading requirements so that a plaintiff's rights are not lost by poor drafting skills of counsel, abolishing many technical pleading requirements, "it does not eliminate the necessity of stating circumstances, occurrences, and events which support the proffered claim." Rule 8, cmt. *Accord Iqbal*, 129 S. Ct. at 149 (stating that Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions).

To survive a motion to dismiss, a complaint must contain sufficient factual matters, accepted as true, to state a claim to relief that is plausible on its face. *Iqbal*, 129 S. Ct. at 1949. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to

draw the reasonable inference that the defendant is liable for the alleged misconduct. *Id.* The plausibility standard asks more than a sheer possibility that a defendant acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief and is deficient. *Id.*

Determining whether a complaint states a plausible claim for relief is a context specific task that requires a court to draw on its judicial experience and common sense. But where the well pleaded facts do not permit the court to infer more than the mere possibility, the conclusory nature of allegations disentitles the plaintiff to the presumption of truth. *Twombly*, 550 U.S. at 570. A complaint must nudge the plaintiff's claims across the line from conceivable to plausible. *Iqbal*, 129 S. Ct. at 1950-51, *quoting Twombly*, 550 U.S. at 570. Thus, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss. *Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d at 431. The Court must find that the complaint has not identified a set of facts that the Court could find would entitle plaintiff to relief under the law to confirm an order granting the dismissal of the complaint on a Rule 12(b)(6) motion. *See Rose v. Tullos*, 994 So. 2d 734, 737 (Miss. 2008).

To allege an alienation of affections claim directly against True Temper, Thompson must identify (1) True Temper's wrongful conduct; (2) Barbara's loss of affection or consortium; and (3) a causal connection between the conduct and the loss. *See Saunders v. Alford*, 607 So. 2d 1214, 1215 (Miss. 1992). The wronged spouse must establish that his wife "was induced to abandon [him] by some active interference on the part of the [corporate defendant]." *Kirk v. Koch*, 607 So. 2d 1220, 1222 (Miss. 1992) (*quoting Stanton v. Cox*, 162 Miss. 438, 139 So. 458 (1932)). Thus, to survive a motion to dismiss, Thompson's complaint must allege specific facts showing True Temper's intentional wrongful conduct that persuaded Barbara to commence an extramarital affair with Brown. It does not.



Mississippi law requires factual details of True Temper's persuasion, enticement, or inducement that caused Barbara to abandon Thompson to support a claim against it for alienation of affections. There must be some well pleaded facts that Barbara was induced to abandon Thompson by some *active interference* on the part of True Temper. *Fitch v. Valentine*, 959 So. 2d 1012, 1019 (Miss. 2007) (emphasis added). But where the well pleaded facts do not permit the court to infer more than the mere possibility of active interference, the conclusory nature of allegations disentitles Thompson to the presumption of truth.

Besides being meaningless, Thompson's allegations need not be credited as true. He alleges that True Temper "permitted an atmosphere" at the Amory plant "engendering the development" of an affair between his wife and Brown. Rephrased, Thompson contends that True Temper permitted a climate that was conducive to "creating the gradual creation of an affair." It is simply not possible to infer even a possibility of active interference by True Temper to transform "permitting an atmosphere engendering the development" of an affair into intentional active conduct by True Temper that promoted Barbara's extra-marital affair. Allegations that stop short of the line between possibility and plausibility of entitlement to relief are deficient. *Iqbal*, 129 S. Ct. at 1949. The complaint does not nudge Thompson's claims against True Temper across the line from conceivable to plausible. *Twombly*, 550 U.S. at 570.

Assuming that some meaning can be extrapolated from Thompson's nonsensical allegations against True Temper, his contentions might describe some tacit conduct by True Temper. However, the cause of action of alienation of affection is an intentional tort. See *Martin v. Illinois Central Railroad Co.*, 246 Miss. 102, 149 So. 2d 344, 348 (1963) (confirming that "it must appear that there has been direct interference on the part of defendant" to support a

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<sup>2</sup> Engendering is defined to mean creating and occasioning. Merriam Webster Dictionary, 172 (1995). Developing is defined to mean coming into being gradually. *Id.* at 143.

claim for alienation of affections), citing *Stanton v. Cox*, 162 Miss. 438, 139 So. 458. See also *Fulkerson v. Odom*, 53 So. 3d 849 (Miss. Ct. App. 2011) (noting that the claim of alienation of affection is an intentional tort); *Nelson v. Jacobsen*, 669 P.2d 1207, 1216-17 (Utah 1983) (holding that alienation of affections claim is an intentional tort). Thompson's allegations simply do not describe the requisite "active interference" – the intent – by True Temper necessary to state a basis on which recovery can be had for alienation of affections. See e.g., *Knight v. Woodfield*, 50 So. 3d 995 (Miss. 2011) (holding that foreign defendant's intentional conduct of emailing, calling and text messaging showed that he "purposefully directed his actions at a resident in the forum" to constitute minimum contacts for a Mississippi court to exercise personal jurisdiction over the paramour in a suit for alienation of affections brought by yet another disgruntled spouse). See also *Fitch v. Valentine*, 959 So. 2d at 1019 (holding that the right sought to be protected from an intruding third party by the cause of action is that of consortium and that "the tort of alienation of affections also provides an appropriate remedy for intentional conduct which causes a loss of consortium"), citing *Powell v. American Motors Corp.*, 834 S.W.2d 184, 188 (Mo. 1992) (holding alienation of affections is an intentional tort).

Thompson seeks succor from *Children's Medical Group, P.A. v. Phillips*, 940 So. 2d 931, 933 (Miss. 2006). In that decision, a majority of the court examined general pleading requirements under Miss. R. Civ. Pro. 8. Placing emphasis on the rule's general purpose of notice, the majority ignored the requirements of the rule itself, which mandates "the necessity of stating circumstances, occurrences and events which support the proffered claims." (Cmt). Without the benefit of the United States Supreme Court's analysis in *Twombly* and *Iqbal*, the majority then concluded that the accused employer failed to demonstrate that the disgruntled spouse could not prevail under any set of imaginary facts. *Phillips*, 940 So. 2d at 934. Additional guidance now available for a reviewing court instructs that the allegations of a

complaint must "nudge the plaintiff's claims across the line from conceivable to plausible." Where the well pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has not shown that the pleader is entitled to relief. *Id.* at 1950-51, *quoting Twombly*, 550 U.S. at 570. The burden of proof is not shifted from the plaintiff to the defendant, as the *Phillips'* majority suggests, to disprove some possible fantastic speculation. The onus remains on the plaintiff to allege facts that state a plausible entitlement to relief.

Thompson's claim of alienation of affections directly against True Temper rests on the sole premise that True Temper permitted its Amory, Mississippi plant to have an "atmosphere engendering the development" of Barbara's affair. However, the climate at the Amory plant did not intrude on Thompson's protected property rights to Barbara's "services and companionship and consortium." *Fitch v. Valentine*, 959 So. 2d at 1019. Allegedly, Brown did that. There are no facts asserted in Thompson's complaint that True Temper actively interfered in Barbara's personal life and promoted an affair with Brown. As other courts have noted, employers are not obliged to police the private conduct of their employees for the protection of the employees' spouses. Employers have no duty to determine the marital status of their employees, and it is unreasonable to impose on them a duty to monitor romantic relationships. *Jackson v. Righter*, 891 P.2d 1387, 1393 (Utah 1995). For, to impose such a burden on a corporate employer would extend the potential liability of employers indefinitely. *See Smith v. Lee*, 2007 WL 3124552 (W.D. N.C. 2007).

The circuit court's assessment of the claims alleged against True Temper is correct. Thompson failed to allege any intentional conduct by True Temper that entitles him to recover against it for the alienation of his wife's affections. The circuit court's judgment should be affirmed.

**2. The Circuit Court Correctly Granted True Temper's Motion to Dismiss the Vicarious Liability Claims Asserted Against it for its Employees' Extra-Marital Affair**

Thompson contends that True Temper is vicariously liable to him for the conduct of its plant manager, Brown. Miss. Code Ann. §79-10-67(2) provides that "[a] domestic or foreign professional corporation whose employees perform professional services within the scope of their employment or of their apparent authority to act for the corporation is liable to the same extent as its employees." Thus, "[u]nder the doctrine of [vicarious liability], the master is liable for the acts of his servant which are done in the course of his employment and in furtherance of the master's business." *Sandifer Oil Co. v. Dew*, 71 So. 2d 752, 758 (Miss. 1954). True Temper contends that Brown's alleged acts of carrying on a consensual extramarital affair with Barbara is not within the scope of Brown's employment and in no way furthered the business of True Temper. Brown's acts were nothing more than a frolic.

This Court, and many other jurisdictions, has consistently held that "some actions are so clearly beyond an employee's course and scope of employment that they cannot form the basis of vicarious liability, as a matter of law." *Children's Medical Group, P.A. v. Phillips*, 940 So. 2d at 935 (clinic was not vicariously liable for doctor's extramarital affair with other employee of clinic); *Cockrell v. Pearl River Valley Water Supply District*, 865 So. 2d 357, 362 (Miss. 2004) (law enforcement officer outside scope of employment when he made romantic advances toward arrestee). See also *L.T. v. City of Jackson*, 145 F. Supp. 2d 750, 757 (S.D. Miss. 2000) (security guard outside scope of employment when he had sex with woman in exchange for dismissing citation); *Jackson v. Righter*, 891 P.2d 1387, 1390 (Utah 1995) (employer not liable because employee was clearly outside scope of employment when making romantic advances at plaintiff's wife); *Mercier v. Daniels*, 533 S.E.2d 877, 881 (N.C. App. 2000) (no vicarious liability where workplace affair in no way furthered employer's business).

Additionally, this Court has held that "[i]f an employee deviates or departs from his work to accomplish some purpose of his own not connected with his employment – goes on a frolic of his own –the relation of master and servant is thereby temporarily suspended, and the employer is not vicariously liable." *Seedkem S., Inc. v. Lee*, 391 So. 2d 990, 995 (Miss. 1980). *See also Akins v. Golden Triangle Planning & Development District, Inc.*, 34 So. 3d 575 (Miss. 2010) (holding employer not vicariously liable for supervising employee's embezzlement of funds as the employee was acting outside the scope of her employment and employer did not benefit from her illegal activities). Brown's alleged acts with Barbara deviated from his work and solely benefited a purpose of his own, thereby temporarily suspending the master servant relationship between him and True Temper.

Presumably realizing that his claim for vicarious liability is tenuous, Thompson offers an alternative theory under the rubric of agency in his brief. Thompson postulates that (1) Brown was "charged with enforcing discouragement of the development of relationships of the sort complained of herein" and (2) "it was within the scope of [Brown's] employment to investigate and prohibit relationships between co-workers." [Appellant's Brief, p 19] Even assuming that this Court indulges Thompson's apparent agency theory, (not even articulated in his complaint), he still fails to state a claim upon which he can recover.

The Restatement (Third) of Agency §7.08(b) (2006) states that a principal is not liable on the basis that an agent took action with apparent authority *unless the third party reasonably believes that the agent acts with actual authority and that belief is traceable to a manifestation made by the principal*. In other words, the apparent-authority doctrine on which Thompson relies focuses on the reasonable expectations of third parties with whom an agent deals. *Id.* Nowhere in his Complaint does Thompson identify a single instance in which he encountered or dealt with Brown. Further, there is not a single reference in the complaint to even one instance

where Thompson relied on some "manifestation" communicated by Brown that True Temper would protect Thompson's marriage from possible interference. It is wholly implausible for this Court to infer that Thompson relied on True Temper and its management to protect his wife's affections for him and insure that they remained with him. "It is simply unreasonable to expect businesses to regulate the intimate and personal affairs of their employees." *See Smith v. Lee*, 2007 WL 3124552 (W.D. N.C. 2007) (declining to impose a duty on employers to protect employees' spouses from a workplace romance with a supervisor). *See also Jackson v. Righter*, 891 P.2d at 1393 (same).

In Mississippi, an employer like True Temper is not vicariously liable for an employee's affair that results in a claim for alienation of affections by the cuckold as a matter of law. The allegations of the complaint fail to state a cause of action under either the theories of vicarious liability or apparent agency against True Temper. Therefore, the circuit court's ruling was correct and it should be affirmed.

### CONCLUSION

True Temper respectfully requests that this Court affirm the circuit court's ruling. Thompson did not identify True Temper's active interference – its intentional conduct that alienated Barbara's affections to impose liability on it. Further, Thompson cannot hold True Temper vicariously liable for the frolicsome conduct of its employee Brown, as a matter of law.

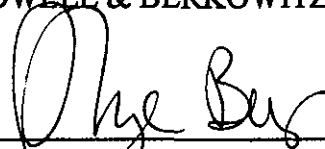
This 26th day of April, 2011.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served by United States Mail, postage prepaid, a true and correct copy of the foregoing instrument to the following counsel of record:

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SO CERTIFIED, this 26th day of April, 2011.

  
\_\_\_\_\_  
SHERYL BEY