

IN THE COURT OF APPEALS OF IOWA

FILED 86

JAN 30 1981

CLERK SUPREME COURT

JAMES C. PLUMB,

)

Plaintiff-Appellee,

)

Filed January 30, 1981

vs.

)

CARROLL BUNSE,

)

Defendant-Appellant.

)

0-390

2-64082

Appeal from Jasper District Court - Thomas Bown, Judge.

Defendant appeals from a judgment for plaintiff in plaintiff's alienation of affections action contending trial court should have sustained his motion to dismiss due to plaintiff's failure to plead and prove preservation of the cause of action in the decree dissolving plaintiff's marriage. **AFFIRMED.**

James R. Cook of Stevens & Cook, Des Moines, Iowa, for defendant-appellant.

Dennis Chalupa of Brierly, McCall, Girdner & Chalupa, Newton, Iowa, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Carroll Bunse, appeals from a judgment for plaintiff, James Plumb, in plaintiff's alienation of affections action. Defendant contends that trial court should have sustained his motion to dismiss due to plaintiff's failure to plead or prove the preservation of the cause of action in the decree dissolving plaintiff's marriage. We affirm.

Plaintiff, in his 1976 dissolution decree, specifically preserved the right to sue defendant, Carroll Bunse, for alienation of the affections of Kathryn Plumb, plaintiff's former wife. This action was filed November 15, 1976, and tried on August 14, 1979. At the conclusion of plaintiff's case-in-chief, defendant moved to dismiss the cause of action due to plaintiff's failure either to plead and prove the preservation of the alienation of affections action in the dissolution decree. At the hearing on the motion, defense counsel stipulated that the cause of action had been preserved in the decree. The court overruled defendant's motion to dismiss and allowed plaintiff to reopen the record to introduce the court file of the dissolution proceedings and the decree. The court also permitted plaintiff to amend his petition to conform to the proof. Thereafter the jury returned a verdict against defendant for \$10,000 actual damages and \$5,000 exemplary damages. Defendant's appeal followed.

I. Scope of Review. Since this is an action at law, our review is on assigned errors only. Iowa R. App. P. 4.

II. Defendant's Motion to Dismiss. Defendant contends that trial court erred in overruling his motion to dismiss on the ground that his challenge to plaintiff's cause of action was in the form of a defense which must be pleaded by the party seeking to use it. He argues: 1) that plaintiff failed to prove preservation in the decree; 2) that an affirmative showing of preservation is a necessary element of a cause of action for alienation of affections; 3) that unless the cause of action is proven to the court, it can only presume jurisdiction; 4) that plaintiff thus failed to prove subject matter jurisdiction of the court; and 5) that an order dismissing the petition thus is the only appropriate disposition.

In our analysis, we first note that the elements required to establish a cause of action for alienation of affections as set forth in Giltner v. Stark, 219 N.W.2d 700, 704 (Iowa 1974), are found in Uniform Jury Instruction No. 27.4. Preservation of the cause of action is not one of the essential elements going to the proof of an alienation of affections action. "... [E]ntry of a dissolution decree which fails to preserve the right

to maintain an alienation of affections action results in its forfeiture." Michael v. Harrison County Rural Electric Cooperative, 292 N.W.2d 417, 420 (Iowa 1980) (emphasis added).

Nor is preservation essential to the subject matter jurisdiction of the court. The district court, as a court of general jurisdiction, "... is assumed ... (to have) the power to adjudicate controversies. Nothing need be put in a petition to show that the court does have subject matter jurisdiction." 2 A. Vestal & P. Willson, Iowa Practice, § 8.01 (1974) (emphasis added). Trial court acquires subject matter jurisdiction over an action when the court has "... the power to hear and determine cases of the general class to which the proceedings belong." Pierce v. Pierce, 287 N.W.2d 879, 881 (Iowa 1980). Since alienation of affections is a common law tort action, the district court clearly has subject matter jurisdiction. Bearbower v. Merry, 266 N.W.2d 128, 134 (Iowa 1978). Therefore, we find no merit in defendant's contention that the error here involved a question of subject matter jurisdiction.

The more narrow issue thus is whether plaintiff here nonetheless must plead preservation of the cause of action in his petition, as well as offer proof thereof. We find that he does not. We agree with trial court that defendant has the burden to raise and prove that plaintiff has forfeited his right to bring the cause of action by failing to preserve it in the decree. See Michael, 292 N.W.2d at 420; Van Ellen v. Meyer, 207 N.W.2d 552, 553-54 (Iowa 1973). Here defense counsel stipulated that the cause of action had been preserved in the decree dissolving plaintiff's marriage, thus ending our inquiry. We therefore affirm trial court's judgment.

AFFIRMED.