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CASENOTE

NUNN V. ALLEN,¹ LIVING SEPARATE AND APART IN NORTH CAROLINA, SEPARATION AGREEMENTS, SEX, THE MEANING OF UNMARRIED, AND LIABILITY OF THIRD PARTIES.

PAULETTE BENZ

I. INTRODUCTION

This winter the North Carolina Court of Appeals again reinforced the viability of the tort of Criminal Conversation in the common law of North Carolina. In *Nunn v. Allen*,² the court held that separation agreements containing interference clauses between spouses would not shield a defendant from liability against the tort of criminal conversation. The court held that the defendant in a criminal conversation action is a third party to a separation agreement. Therefore, a defendant, as a third party, is not protected by any agreement between the spouses, unless the “injured” spouse consented to the other spouse having sexual relations with the defendant.³

This case marks yet another blow to the family. Although the rationalization is that this tort acts as a deterrent to adultery or to keep families together, it causes more harm than the harm it seeks to prevent. Most separation agreements drafted by attorneys contain a clause indicating that the parties agree to live separate and apart and each agrees to not interfere in any way with the other spouse. Additionally, the parties agree to treat each other as if they were unmarried. Attorneys will often inform clients that they may engage in sexual relations with other people but the language will not shield the other people from liability for criminal conversation.⁴

This note is an analysis of the disconnect between the legislative policy toward family dispute resolution and its disregard for the damage of the heart balm tort criminal conversation.

1. *Nunn v. Allen*, 574 S.E. 2d 35 (NC. App. 2002).

2. *Id.*

3. *Id.* at 44.

4. Ertel Berry, *Separation Agreement Didn't Block Criminal Conversation*, N.C. LAW. WKLY, Vol. 15, No. 40 15NCLW1029, Dec. 23, 2002, at 1.

II. STATEMENT OF THE CASE

In this case, husband sued wife's paramour for alienation of affection and criminal conversation. Pursuant to the jury verdict, judgment was entered for the husband. Paramour appealed. The evidence at trial tended to show that plaintiff Donald Nunn married Vickie O'Brien Nunn, now Vickie Woods (hereinafter "Mrs. Nunn"), on 1 July 1978; three sons were born to the marriage. Mrs. Nunn moved out of the couple's home in April 1997. Plaintiff and Mrs. Nunn signed a separation agreement on 8 September 1997, and were divorced on 17 August 1998.⁵

Mrs. Nunn worked for the defendant's family business. The evidence presented at trial tended to show that defendant spent time with Mrs. Nunn at work, after work, and on the weekends before and during the couple's separation. The defendant's corporation helped Mrs. Nunn buy a new car and provided a residence for her grandmother, into which Mrs. Nunn moved after her separation from plaintiff.⁶

After her separation from plaintiff, plaintiff saw Mrs. Nunn and defendant engaged in elicit behavior. Plaintiff testified that in September 1997, he went to defendant's residence with his father and Herman Searcey. They proceeded to peer through the defendant's window, where they observed Mrs. Nunn and defendant kissing. It appeared to the plaintiff that Mrs. Nunn placed her head between the defendant's legs as though she was performing oral sex upon him. Mr. Searcey testified that he saw Mrs. Nunn performing oral sex upon the defendant. The next day, plaintiff's attorney prepared a separation agreement which plaintiff and Mrs. Nunn signed on 8 September 1997.⁷

The defendant admitted that he had sexual intercourse with Mrs. Nunn while she was married to plaintiff.⁸ Defendant argued that the existence of the separation agreement between plaintiff and Mrs. Nunn evidences a waiver by the plaintiff of his "right to exclusive sexual intercourse" with his spouse.⁹

The separation agreement contained the following provision:

LIVING SEPARATE: Husband and Wife shall continue to live separate and apart, each at such place of residence as he or she may freely choose, free from all interference, authority and control, direct or indirect, by the other party, as fully as if each party were unmarried.

5. *Nunn*, 574 S.E. 2d at 39.

6. *Id.* at 39.

7. *Id.* at 39.

8. *Id.* at 43.

9. *Id.* at 43.

Neither shall molest the other nor harass the other, nor compel nor endeavor to compel the other to cohabit or dwell with him or her.

The court held that separation agreements are generally construed like any other contract. The defendant was not a party to the separation agreement. Therefore, he could not assert the clause in the separation agreement as a defense to the plaintiff's claim for criminal conversation. The court also stated that even if the provision at issue was intended by the parties to the agreement, plaintiff and Mrs. Nunn, to address their "right to exclusive sexual intercourse" with the other, the provision related only to the spouses' rights against each other.¹⁰ Therefore, as a matter of law, the provision did not waive the parties' right to exclusive sexual intercourse with each other during coverture.¹¹ The court refused to establish that a separation agreement between spouses would bar a party's claim against third parties for criminal conversation.¹²

III. LEGAL PRECEDENT AND BACKGROUND - CRIMINAL CONVERSATION AND POST SEPARATION CONDUCT.

Criminal conversation is adultery.¹³ A person has an "exclusive right to a sexual relationship with one's spouse."¹⁴ To succeed on a claim of criminal conversation, the elements a plaintiff must prove are: (1) the existence of a valid marriage; and (2) sexual intercourse between the defendant and the plaintiff's spouse during coverture.¹⁵

In *Johnson v. Pierce*, the Court held that a claim for criminal conversation may be based solely upon post-separation sexual relations.¹⁶ However, in *Johnson* no separation agreement existed between the parties. The court would not rely upon 1995 amendments to the alimony statute as a basis for a change in the law. The alimony statute was changed in that the marital misconduct of a spouse is must be prior to the date of separation and not based on post-separation conduct.¹⁷ The pertinent provision of the alimony statute states, ". . . participated in an act of illicit sexual behavior. . . during the marriage and prior to on the date of separation . . ."¹⁸

10. *Id.* at 43.

11. *Id.* at 43. (The legal term coverture is an antiquated and archaic term and is defined as "the *Condition* of being a married woman. . . a woman under coverture was allowed only to sue through the personality of her husband." BLACK'S LAW DICTIONARY 373 (7th Ed. 1999).)

12. *Id.* at 43.

13. *Johnson v. Pearce*, 557 S.E. 2d 189 (N.C. App. 2001).

14. *Id.*

15. *Id.* at 190.

16. *Id.* See also, *Bryant v. Carrier*, 198 S.E. 619 (N.C. 1938) (fact that intercourse occurs during separation of plaintiff and spouse does not bar action for criminal conversation).

17. N.C. GEN. STAT. § 50-16.3A(a) (2002).

18. *Id.*

However, in *Nunn* and *Johnson* neither court established that a separation agreement bars a spouse's claim against third parties for criminal conversation.¹⁹

North Carolina recognizes and authorizes "any married couple . . . to execute a separation agreement not inconsistent with public policy. . . ." ²⁰ Separation agreements are generally construed like any contract between two parties.²¹ Defendant was not a party to the separation agreement. Assuming *arguendo* that the provision at issue was intended by the parties to the agreement to address their "right to exclusive sexual intercourse" with the other, the provision related only to the spouses' rights against each other. For example, a spouse's sexual relations with a third party can affect the legal rights of the spouses with respect to alimony. As a matter of law, the provision did not waive the parties' rights, with respect to third parties for purposes of a criminal conversation claim, to exclusive sexual intercourse with each other during coverture.²²

The same rules that govern the interpretation of contracts generally apply to separation agreements. Where the terms of a separation agreement are plain and explicit, the court will determine the legal effect and enforce it as written by the parties.²³

Courts, however, are unwilling to construe separation agreements that violate public policy or law.²⁴ Even if attorneys began to redraft their separation agreements, there is little hope that the agreement will be enforceable given the state of the law at this time.

Criminal conversation subjects one who has sexual intercourse with one spouse to liability to the other spouse for the harm thus caused to any of the other spouse's legally protected marital interests.²⁵

There are very few defenses to an action for criminal conversation. It is no defense that the defendant did not know the individual was married or that the individual consented to sexual intercourse or even seduced the defendant.²⁶ One who has sexual relations with a married person takes the risk that he or she is married to another. The fact that the spouse misrepresents the marital status is not a defense.²⁷ In addition, there is no requirement that the plaintiff prove that the de-

19. *Nunn*, 574 S.E. 2d 35; *Johnson*, 557 S.E. 2d 189.

20. N.C. GEN. STAT. § 50-10.1 (2002).

21. *Anderson v. Anderson*, 550 S.E.2d 266, 269 (N.C. App. 2001).

22. *Nunn*, 574 S.E. 2d 35.

23. *Blount v. Blount*, 323 S.E. 2d 738 (N.C. App. 1984).

24. N.C. GEN. STAT. § 52-10.1 (2002).

25. RESTATEMENT (SECOND) OF TORTS § 685 (1977).

26. Jennifer E. McDougal, *Legislating Morality: The Actions for Alienation of Affection and Criminal Conversation in North Carolina*, 33 WAKE FOREST L. REV. 163 (1998).

27. RESTATEMENT (SECOND) OF TORTS § 685 (1977).

defendant acted with malice.²⁸ A defendant may be liable for criminal conversation regardless of whether the plaintiff previously had a happy or unhappy marriage and regardless of whether the defendant's actions had any effect on the marriage.²⁹ In addition, prior mistreatment of one's spouse and even one's own infidelity will not protect a defendant from liability. Even the separation of the spouses is not a defense to the action.³⁰

The fact that a husband continues to live with his wife after discovery of her adultery is no defense when he protests and pleads with her to end the affair, and at the time of the action she is living with the defendant in adultery in his home. However, connivance of a husband in his wife's adultery constitutes a defense.³¹ Connivance is a defense that points to the plaintiff's corrupt consent, implied or express, to the action being complained of.³²

The only defenses to a criminal conversation action are the running of the statute of limitations and the plaintiff's consent.³³ However, for a defendant to establish the plaintiff's consent, he must show more than the plaintiff's subsequent forgiveness or acceptance. Rather, he must show that, before the intercourse, the plaintiff approved of or encouraged his spouse to engage in intercourse.³⁴

In an action for criminal conversation, a successful plaintiff may recover compensatory and punitive damages. The plaintiff is entitled to recover for emotional distress resulting from the fact that the defendant has had sexual relations with the other spouse.³⁵ Compensatory damages focus on compensating the plaintiff for his "emotional distress" and may include loss of affections, loss of services, and loss of support as well as recovery for humiliation and mental anguish.³⁶ A plaintiff need not prove any amount of pecuniary loss to recover damages.³⁷

The jury may decide to award punitive damages in any successful criminal conversation action.³⁸ As with alienation of affections, sexual intercourse is generally the key to an award of punitive damages, de-

28. McDougal, *supra* note 26.

29. *Id.*

30. *Id.*

31. 17 N.C. INDEX 4TH HUSBAND AND WIFE § 65

32. BLACK'S LAW DICTIONARY 298 (7th ed. 1999).

33. McDougal, *supra* note 26.

34. *Id.*

35. RESTATEMENT (SECOND) OF TORTS § 685 (1977).

36. Sebastian v. Kluttz, 170 S.E.2d 104, 114 (N.C. App. 1969).

37. McDougal, *supra* note 26.

38. *Id.*

spite the fact that sexual intercourse is a necessary element in every criminal conversation action.³⁹

IV. ANALYSIS

In 1984, citing many of the reasons given by courts in other states for abolishing the torts for alienation of affections and criminal conversation, the North Carolina Court of Appeals attempted to abolish both of these torts in the case of *Cannon v. Miller*.⁴⁰

The court reviewed the history behind the torts and the purported purposes of the torts, which include “to compensate for private injury judicially described as loss of ‘consortium,’ to deter marital interference, and to promote marital harmony.” The primary common law interest protected by the action came to be the maintenance of pure blood lines for inheritance purposes.⁴¹ The “heart balm” torts have been severely criticized by commentators and their abolition has been almost universally advocated.⁴²

In *Cannon v. Miller*, the Court of Appeals court the boldly held “the actions remain permeated with the uncultivated and obsolete ideas which marked their origin. We hold that the causes of actions of alienation of affections and criminal conversation are hereby abolished in this jurisdiction”⁴³

The “death” of alienation of affections and criminal conversation in North Carolina lasted precisely two months and twenty-three days until the Court of Appeals’ decision was vacated by the North Carolina Supreme Court.⁴⁴

The North Carolina Supreme court vacated the Court of Appeals decision, stating “[i]t appears that the panel of Judges of the Court of Appeals to which this case was assigned has acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court.”⁴⁵

While the actions of alienation of affections and criminal conversation have flourished in North Carolina, the unequivocal national trend is towards abolition of either or both of these actions. Even in states that have retained these tort actions, many courts have disfavored

39. *Id.*

40. 322 S.E.2d 780 (N.C. App. 1984), *vacated*, 327 S.E.2d 888 (N.C. 1985)

41. *Id.* at 790.

42. McDougal, *supra* note 26.

43. 322 S.E.2d 780, 803 (N.C. App. 1984), *vacated*, 327 S.E.2d 888 (N.C. 1985)

44. McDougal, *supra* note 26.

45. *Cannon v. Miller*, 327 S.E. 2d at 888.

them. However, they have deferred to the state legislatures to abolish them, rather than doing it by judicial ruling.⁴⁶

In the North Carolina family law arena, in recent years there has been a shift away from litigation and toward mediation, negotiation and settlement. The legislature has encouraged mediation where possible. Even making mediation mandatory in some cases.

With the passage the Family Law Arbitration Act of 1995, the legislature has proven its willingness to establish a gentler system governing the settlement and resolution of family law disputes. The purpose of the Family Law Arbitration Act of 1995 is to provide for arbitration as an efficient and speedy means resolving disputes consistent with Chapters 50, 50A, 50B, 51, 52, 52B and 52C of the General Statute.⁴⁷

In addition, the court has authorized community mediation centers. The general assembly found that mediation centers are in the public interest to facilitate communication, understanding, reconciliation, and settlement of conflicts.⁴⁸

Moreover, the General Assembly has made mediation mandatory where there is child custody and visitation dispute. This action has made North Carolina join the national trend toward alternative dispute resolution as opposed to an adversarial process. Under N.C. Gen Stat. §50-13.1 and § 7A-494 the program provides a forum to focus on the best interests of the children.⁴⁹

By continuing to allow the common law tort of criminal conversation to be a viable cause of action there is a disconnect between the policies and goal of the family law system.

In *Cannon v. Miller*, the court indicated heart balm torts are used maliciously by spouses during a period of extreme emotional upset. Families are being torn apart by divorce and by allowing parties to pursue revenge through the court system; the legislature and court are promoting more disruption to the family and children.

These decisions by the legislature to aid the people of the state of North Carolina during a time of crisis are inapposite of their silence with respect to the heart balm torts. The children of divorce are the individuals who suffer when their parents are allowed to continually attack the other parent.

Although the heart balm torts are directed to the third party to the infidelity, it still affects children of a divorce in that the third party

46. *Id.*

47. N.C. GEN. STAT §50-41 (2002).

48. N.C. GEN. STAT. §7A-38.5 (2002).

49. *Child Custody and Visitation Mediation Program*, The Intermediary, N. C. B. A. Vol. 3, Issue 7 (2002).

may become a step-parent and causes more animosity between parents. Therefore, the heart balm torts are will prevent new families from solidifying and may prevent children from developing a bond with an adult who may be part of their lives.

With the divorce rates as high as they are now, the continuation of the viability of the heart balm tort is a disservice to the children affected by the dissolution of marriage.

V. CONCLUSION

In conclusion, a third party may never be protected by a parties' separation agreement. This note is not pro-adultery. Adulterous behavior causes pain to the individuals and families involved. However, North Carolina, by continuing to maintain the heart balm torts of alienation of affection and criminal conversation, allows the continuation of pain and anger resulting from adultery. The legislature needs to step up to the plate and abolish the tort of criminal conversation.

