

800.25 CRIMINAL CONVERSATION. (ADULTERY).

The (*state number*) issue reads:

“Did the defendant commit criminal conversation with the plaintiff’s spouse?”

Criminal conversation is sexual intercourse with the spouse of another person during the marriage.¹

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the following two things:

First, that during the marriage of the plaintiff and the plaintiff’s spouse, the defendant had sexual intercourse with the spouse of the plaintiff² [in the State of North Carolina.³]

And second, that the sexual intercourse between the defendant and the spouse of the plaintiff occurred

[during the marriage⁴]

[prior to the physical separation of the plaintiff and the plaintiff’s spouse with the intent on the part of either the plaintiff or the plaintiff’s spouse that the physical separation remain permanent.⁵

Evidence of conduct of the defendant occurring after the plaintiff and the plaintiff’s spouse physically separated with the intent on the part of either the plaintiff or the plaintiff’s spouse that the physical separation remain permanent may only be considered for the purpose of corroborating or supporting any evidence of malicious and wrongful conduct on the part of the defendant occurring before the plaintiff and the plaintiff’s spouse physically separated.]⁶

[It is not required that the defendant be aware of the marriage between the plaintiff and the plaintiff's spouse.^{7]}

[A single act of sexual intercourse between the defendant and the plaintiff's spouse will entitle the plaintiff to recover.^{8]}

[You must not consider whether the plaintiff's spouse consented to or enticed the sexual intercourse.^{9]}

[You must not consider whether the marital relationship between the plaintiff and the plaintiff's spouse was accompanied by love and affection.^{10]}

[You must not consider whether the plaintiff was ever unfaithful to the plaintiff's spouse.^{11]}

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant had sexual intercourse [in the State of North Carolina] with the spouse of the plaintiff while the plaintiff and the plaintiff's spouse were married, [and that the sexual intercourse between the defendant and the spouse of the plaintiff occurred prior to the physical separation of the plaintiff and the plaintiff's spouse with the intent on the part of either the plaintiff or the plaintiff's spouse that the physical separation remain permanent,] then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

1. *Beavers v. McMican*, 385 N.C. 629, 636, 898 S.E.2d 690, 696 (2024).

2. Elements of a criminal conversation claim are: (1) "marriage between the spouses" and (2) "sexual intercourse between defendant and plaintiff's spouse during the [marriage]." *Sebastian v. Klutz*, 6 N.C. App. 201, 209, 170 S.E.2d 104, 109 (1969). *See also Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996) ("The elements of criminal conversation are the actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture.").

3. *See Jones v. Skelley*, 195 N.C. App. 500, 511, 673 S.E.2d 385, 392-93 (2009) ("[A] plaintiff must also show 'that the tortious injuries[,] . . . [the] criminal conversation, occurred in North Carolina before North Carolina substantive law can be applied.' Consequently, a

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plaintiff must show that a defendant engaged in sexual intercourse with her spouse in North Carolina.” (citation omitted)). Accordingly, the bracketed instruction should be used if there is a factual dispute about whether the criminal conversation occurred in North Carolina.

4. *Beavers v. McMican*, 385 N.C. 629, 636, 898 S.E.2d 690, 696 (2024).

5. N.C.G.S. § 52-13(a) (2009).

6. See *Pharr v. Beck*, 147 N.C. App. 268, 273, 554 S.E.2d 851, 855 (2001) (finding in an alienation of affection action that “post-separation conduct is admissible only to the extent [that] it corroborates pre-separation activities resulting in the alienation of affection”). The holding in *Pharr* is effectively reinstated by N.C.G.S. § 52-13. If evidence of post-separation conduct is used to corroborate pre-separation conduct, the evidence of pre-separation conduct must “give rise to more than mere conjecture.” *Beavers v. McMican*, 385 N.C. 629, 636, 898 S.E.2d 690, 696 (2024).

7. See Suzanne Reynolds, *1 Lee’s North Carolina Family Law* § 5.46(B), n.749 (5th ed. 2009) (“One who has sexual relations with another not one’s spouse takes the risk that the other may be somebody else’s spouse.”(citing 2 F. Harper *et al.*, *The Law of Torts* § 8.3, 511 (2d ed. 1986))).

8. See *Jones v. Skelley*, 195 N.C. App. 500, 511, 673 S.E.2d 385, 393 (2009).

9. See *Malecek v. Williams*, 255 N.C. App. 300, 305, 804 S.E.2d 592, 596 (2017) (noting that a cause of action for criminal conversation exists even if the intimate sexual conduct is between “consenting adults”). However, the consent of the plaintiff would be a viable defense. See *Cannon v. Miller*, 71 N.C. App. 460, 465-66, 322 S.E.2d 780, 785-86 (1984), *vacated on other grounds*, 313 N.C. 324, 327 S.E.2d 888 (1985) (stating that the plaintiff’s consent is the only substantive defense to a claim for criminal conversation); *Barker v. Dowdy*, 223 N.C. 151, 152, 25 S.E.2d 404, 405 (1943) (stating that “connivance” of a spouse in the adultery of the other spouse “would constitute a defense to an action for criminal conversation”); *cf. Reynolds, supra* note 6, § 5.46(B) (“[T]o establish consent or connivance, . . . the defendant should have to establish that, before the sexual intercourse [occurred], the plaintiff either encouraged the conduct or at least approved it.”).

10. See *Sebastian v. Kluttz*, 6 N.C. App. 201, 209, 170 S.E.2d 104, 109 (1969).

11. *Scott v. Kiker*, 59 N.C. App. 458, 463, 297 S.E.2d 142, 146 (1982).