800.25 CRIMINAL CONVERSATION. (ADULTERY).

> *NOTE WELL: N.C. Gen. Stat. § 52-13 (a), effective October 1, 2009, and applicable to actions arising from acts occurring on or after that date, provides as follows:*
>
> *No act of the defendant shall give rise to a cause for . . . criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent.*
>
> *This statutory amendment is incorporated into the bracketed second element in this instruction.*
>
> *Actions arising from acts occurring prior to October 1, 2009, are governed solely by the decisions in* Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E.2d 104 (1969),* Brown v. Hurley*, 124 N.C. App. 377, 477 S.E.2d 234 (1996),* Bryant v. Carrier*, 214 N.C. 191, 198 S.E. 619 (1938) ("The mere fact of separation will not bar an action for criminal conversation occurring during separation."). In actions arising from acts occurring prior to October 1, 2009, the bracketed second element in this instruction would not be used.*

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 thing] [two things]:

[First,] that during the marriage of the plaintiff and *his* spouse, the

defendant had sexual intercourse with the spouse of the plaintiff[2] [in the State of North Carolina.[3]]

[Second, that the sexual intercourse between the defendant and the spouse of the plaintiff occurred prior to the physical separation of the plaintiff and *his* spouse with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent.[4]]

[Evidence of conduct of the defendant occurring after the plaintiff and *his* spouse physically separated with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent may not be considered by you in your determination of any fact in this trial, but may be considered only 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 *his* spouse physically separated.[5]]

[It is not required that the defendant be aware of the marriage between the plaintiff and *his* spouse.[6]]

[A single act of sexual intercourse between the defendant and the plaintiff's spouse will entitle the plaintiff to recover.[7]]

[You must not consider whether the plaintiff's spouse consented to or enticed the sexual intercourse].[8]

[You must not consider whether the marital relationship between the plaintiff and *his* spouse was accompanied by love and affection].[9]

[You must not consider whether the plaintiff and *his* spouse had separated and ceased cohabitation before the sexual intercourse occurred].[10]

[You must not consider whether the plaintiff was ever unfaithful to *his* 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 *his* 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 *his* spouse with the intent on the part of either the plaintiff or *his* 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.

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1. A claim of criminal conversation must be based upon "evidence demonstrating: '(1) marriage between the spouses and (2) sexual intercourse between defendant and plaintiff's spouse during the marriage.'" *Coachman v. Gould*, 122 N.C. App. 443, 446, 470 S.E.2d 560, 563 (1996) (citation omitted).

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. Kluttz*, 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 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. N.C. Gen. Stat. § 52-13(a) (2009).

5. *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"), *overruled on other grounds*, *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006) ("We . . . overrule *Pharr* to the extent it requires an alienation of affections claim to be based on pre-separation conduct alone."). The holding in *Pharr* is effectively reinstated by N.C. Gen. Stat. § 52-13.

6. *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))).

7. *See Skelley*, 195 N.C. App. at 511, 673 S.E.2d at 393.

8. *See Scott v. Kiker*, 59 N.C. App. 458, 464, 297 S.E.2d 142, 147 (1982).

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.").

9. *See Sebastian*, 6 N.C. App. at 209, 170 S.E.2d at 109.

10. *See id*. at 210, 170 S.E.2d at 109; *Brown*, 124 N.C. App. at 380, 477 S.E.2d at 237; *Bryant v. Carrier*, 214 N.C. 191, 195, 198 S.E. 619, 621 (1938) ("The mere fact of separation will not bar an action for criminal conversation occurring during separation." (citation and internal quotations omitted)).

However, in light of the statutory amendment cited in the NOTE WELL, this alternative would be applicable only to actions arising from acts occurring before October 1, 2009.

11. *Scott*, 59 N.C. App. at 463, 297 S.E.2d at 146.