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STATE OF NORTH CAROLINA
FORSYTH COUNTY

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SUPERIOR COURT DIVISION

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14 CVS 870

ANGELA R. ROTHROCK,
Plaintiff,

FORSYTH COUNTY, C.S. C
by *Richard A. Steele*

v.

OPINION AND ORDER

SHERRY A. COOKE,
Defendant.

THIS MATTER comes before the Court upon Defendant Sherry Cooke’s (hereinafter “Defendant”) motion to dismiss the Criminal Conversation and Alienation of Affection claims for relief filed against her by Plaintiff Angela Rothrock (hereinafter “Plaintiff”) and to invalidate the common law torts of Criminal Conversation and Alienation of Affection pursuant to Rule 12(b)(1) and 12(b)(6), on the following grounds:

1. Criminal conversation is unconstitutional both facially and as applied to the facts set out in the Plaintiff’s complaint as a due process violation of liberty and privacy interests guaranteed by the Fourteenth Amendment to the United States Constitution and as a violation of the corresponding provisions contained in the Constitution of the State of North Carolina.
2. Alienation of affection is unconstitutional both facially and as applied to the facts set out in the Plaintiff’s complaint as a due process violation of liberty and privacy interests guaranteed by the Fourteenth Amendment to the United States Constitution, freedom of speech rights guaranteed by the First Amendment to the United States Constitution, and as a violation of the corresponding provisions contained in the Constitution of the State of North Carolina.

Procedural History

The relevant procedural history regarding this case is as follows:

*cc. Vermitzky
Hutchins*

1. Plaintiff filed a complaint for alienation of affection and criminal conversation on February 12, 2014, wherein she alleged that Defendant had an adulterous affair with Plaintiff's husband, and that the adulterous relationship caused Plaintiff to lose the love and affection of her husband.
2. Defendant filed a Motion for Extension of Time on February 27, 2014, which was granted by the Court.
3. On March 10, 2014, Defendant filed an Answer along with a Motion to Dismiss Plaintiff's Complaint.
4. During the week of April 7, 2014, the Defendant's Motions to Dismiss were heard and argued before this Court.

Introduction

This decision will not be based on public policy grounds. The North Carolina Supreme Court (hereinafter "N.C. Supreme Court") has unequivocally held that changes in the law based on public policy rest solely within the prerogatives of the legislative branch of government, not the judicial. *State v. Revis*, 193 N.C. 192, 192, 136 S.E. 346, 347 (1927) (citations omitted)¹. On the other hand, laws, whether grounded in statute or common law, may be tested in the courts to determine if they pass constitutional muster. *Id.* This opinion will examine the torts of alienation of affection and criminal conversation to determine if they violate the constitutional guarantees of free speech, free expression, free association, and substantive due process, made applicable to North Carolina law by the Fourteenth Amendment of the U.S. Constitution, as well as North Carolina's own Law of the Land clause in Article 1, Sec. 19.²

Alienation of affection and criminal conversation claims allow the plaintiff to seek compensatory relief for out-of-pocket damages, damages compensating any intentional infliction of emotional distress claims for relief, and potentially punitive damages for any malicious

¹ Additionally, in *Cannon v Miller* the N.C. Supreme Court vacated a N.C. Court of Appeals decision that attempted to abolish AA and CC under public policy grounds. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985).

²The N.C. Supreme Court is "cognizant that the Law of the Land Clause of the North Carolina Constitution, N.C. Const. art. 1, § 19, "is synonymous with Due Process of law as found in the Fourteenth Amendment to the Federal Constitution.""³ *State v. Bryant*, 359 N.C. 554, 563, 614 S.E.2d 479, 485 (2005) (citations omitted). Moreover, although the N.C. Supreme Court has held that North Carolina may construe its constitution differently from the U.S. Constitution, it can only accord more, rather than less, protection than its federal counterpart. *State v Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988).

conduct by the defendant. Although this opinion will often refer specifically to punitive damages, a finding that alienation of affection and criminal conversation violate the U.S. Constitution, as well as violate North Carolina's own Law of the Land clause, will uniformly apply to both the compensatory and punitive claims aspects of those common law causes of action.

Opinion

I. Actions by North Carolina courts in conducting trials and imposing judgments in Alienation of Affection and Criminal Conversation cases are sufficient to constitute "state action."

The Supreme Court of the United States (hereinafter "U.S. Supreme Court") has long recognized the axiom that "[t]he action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defen[d], has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1, 16 (1948). Two decades later, the Court stated that "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (holding that sufficient state action existed where the state court applied a rule of law claimed to impose invalid restrictions on constitutional freedoms, regardless that the law applied was a common law civil action). Moreover, "the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process." *Kraemer*, 334 U.S. at 17.

Alienation of affection and criminal conversation (hereinafter "AA" and "CC") are common law causes of action, euphemistically known as "heart balm" torts, and North Carolina courts routinely hear cases pertaining to AA and CC. Therefore, sufficient state action exists because North Carolina courts conduct trials and impose judgments in cases of AA and CC.³

³ North Carolina courts' recognition and allowance of the common law torts of AA and CC, as well as maintaining them as viable causes of action, is tantamount to state regulation. Due to their controlling effect, this opinion will henceforth refer to alienation of affection and criminal conversation in shorthand form as "regulations".

Furthermore, punitive damages claims routinely accompany AA and CC cases, and North Carolina courts often play a role in the enforcement of punitive damages in AA and CC cases.⁴ According to N.C. Gen. Stat. § 1D-1, the purpose of punitive damages is “to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts.” N.C. Gen. Stat. § 1D-1 (2011). Punitive damages are allowed in common law actions. N.C. Gen. Stat. § 1D-10 (2011). N.C. Gen. Stat. § 1D-15 sets forth standards for punitive damages, with pertinent sections stating:

- (a) *Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:*
- (1) *Fraud.*
 - (2) *Malice.*
 - (3) *Willful or wanton conduct.*
- (b) *The claimant must prove the existence of an aggravating factor by clear and convincing evidence.*

N.C. Gen. Stat. § 1D-15 (2011).

In bringing an AA cause of action, the plaintiff must prove the following:

- (1) [t]hat plaintiff and [plaintiff’s spouse] were happily married, and that a genuine love and affection existed between them; (2) that the love and affection so existing was alienated and destroyed; (3) that the wrongful and malicious acts of defendant produced and brought about the loss and alienation of such love and affection.

Hankins v. Hankins, 202 N.C. 358, 358, 162 S.E. 766, 767 (1932).

For a claim of CC, the plaintiff must prove “the actual marriage between the spouses and sexual intercourse between defendant and plaintiff’s spouse during the coveture.” *Sebastian v. Kluttz*, 6 N.C. App. 201, 209, 170 S.E.2d 104, 109 (1969).

The N.C. General Assembly additionally passed N.C. Gen. Stat. § 52-13 in 2009, which sets forth the procedures in causes of action for AA and CC. It states:

⁴ See, e.g., *Oddo v. Presser*, 358 N.C. 128, 592 S.E.2d 195 (2004) (N.C. Supreme Court upheld an award to the plaintiff in the amount of \$910,000 in compensatory damages and \$500,000 in punitive damages); See also *Ward v. Beaton*, 141 N.C. App. 44, 539 S.E.2d 30 (2000) (The plaintiff sought compensatory and punitive damages for alienation of affection from her husband’s paramour).

- (a) *No act of the defendant shall give rise to a cause of action for alienation of affection or 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.*
- (b) *An action for alienation of affection or criminal conversation shall not be commenced more than three years from the last act of the defendant giving rise to the cause of action.*
- (c) *A person may commence a cause of action for alienation of affection or criminal conversation against a natural person only.*

N.C. Gen. Stat. § 52-13 (2011).

In light of this Court's finding that sufficient state action exists in relation to this case, the opinion will analyze the common law torts of AA and CC in order to determine whether they infringe upon fundamental freedoms of free speech, expressive conduct, and free association as protected by the First Amendment or implicitly violate the Fourteenth Amendment's substantive due process protections regarding an individual's right to engage in consensual private conduct. For "[i]t is well settled that [...] if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.'" *Harris v. McRae*, 448 U.S. 297, 312 (1980). In other words, the U.S. Supreme Court recognizes "that the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life." *Id.* at 312. It is imperative to acknowledge that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual." *Kraemer*, 334 U.S. at 22. "The rights established are *personal rights*." *Id.* (emphasis added).

II. Enforcement of Alienation of Affection and Criminal Conversation common law causes of action by North Carolina courts violates the First Amendment guarantee of free speech, free expression, and free association as incorporated through the Fourteenth Amendment's Due Process Clause.

This portion of the opinion will focus on AA and CC with respect to the First Amendment. The First Amendment of the U.S. Constitution states "Congress shall make no law [...] abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const Amend. I. In the constitutional context, AA and CC present troubling issues regarding their impact on the First

Amendment rights of free speech, free expression, and free association. Taking the allegations in Plaintiff's Complaint as true, for purposes of a Rule 12(b)(6) analysis, AA inherently imposes a chilling effect upon free speech, free association, and expressive conduct within a constitutionally-protected area, or between people with close familial or amicable relationships. As for CC, its overly broad reach into constitutionally-protected areas infringes upon the First Amendment's protection of consensual conduct occurring within the private confines of one's home, as well as an individual's right to freely associate with another. This portion of the opinion will first discuss the First Amendment's protection of free speech concerning AA; next, the focus will shift to whether AA and CC's prohibition of mutually consensual sexual intercourse violates the First Amendment's protection of expressive conduct. AA and CC will then be analyzed as they relate to the First Amendment's guarantee of free association.

A. The North Carolina common law curtailment of the protected speech necessary to sustain an Alienation of Affection claim violates the First Amendment's protection of free speech as incorporated through the Fourteenth Amendment's Due Process Clause.

An AA analysis of the First Amendment's protection of free speech focuses solely upon the possible prohibitory effect AA has upon a person's free speech.⁵ AA's reliance upon showing that the defendant's speech or conduct resulted in destruction and alienation of spousal love and affection causes a potential chilling effect on speech. As previously stated, AA requires: (1) the existence of a happy marriage between plaintiff and plaintiff's spouse, and that a genuine love and affection existed between them; (2) that the existing love and affection was subsequently alienated and destroyed; and (3) that the defendant's wrongful and malicious acts produced and brought about the loss and alienation of that spousal love and affection. *Hankins*, 202 N.C. at 358, 162 S.E. at 767. The N.C. Supreme Court further explained that the defendant's "wrongful and malicious conduct [...] need not be the sole cause of alienation", and it suffices if the defendant's conduct is the "controlling or effective cause of the alienation", even though other causes may have contributed to the alienation. *Bishop v. Glazener*, 245 N.C. 592, 596, 96 S.E.2d 870, 873 (1957).

⁵ See, e.g., *Johnston v. Johnston*, 213 N.C. 255, 255, 195 S.E. 807, 808 (1938) (holding that "the law will not tolerate peccancy or officious intermeddling and malicious interference with the marital rights of others, either on the part of parents or [anyone] else"); See also *Bishop v. Glazener*, 245 N.C. 592, 96 S.E.2d 870 (1957).

Several initial determinations are required in considering whether the First Amendment will protect particular speech and, if so, the necessary level of protection required for that speech. The first determination is whether sufficient state action exists. As discussed earlier, sufficient state action exists because North Carolina courts conduct trials and impose judgments in AA cases. The courts must also follow the legislative mandates enumerated in N.C. Gen. Stat. Chapter 1D and N.C. Gen. Stat. § 52-13.

The next inquiry is whether the state constraint is content-based or content-neutral.⁶ If content-based, the state must survive a strict scrutiny analysis by proving the state narrowly tailored the proscription to further a compelling state interest. *State v. Petersilie*, 334 N.C. 169, 183, 184, 432 S.E.2d 832, 840 (1993). AA obviously constitutes a content-based prohibition on speech, because determining whether the defendant's speech resulted in the loss of spousal love and affection necessarily requires investigating the meaning of the defendant's speech. The U.S. Supreme Court's enforcement of First Amendment protections prohibit a state from punishing speech because it disapproves of the ideas expressed. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). Following from that premise is the presumption that content-based prohibitions are invalid. *Id.*

Although content-based constraints are presumptively invalid, the presumption is rebuttable if the curtailment survives strict scrutiny or the proscribed speech falls within a traditionally-recognized unprotected speech category. *Id.* It is essential for the state to prove the existence of a compelling interest because the First Amendment protects all speech and a government's encroachment upon that freedom must pass strict scrutiny (i.e., a compelling governmental interest), unless the particular speech falls within an enumerated list of unprotected speech, including obscenity, true threats, incitement, defamation, or false speech. *Petersilie*, 334 N.C. at 183, 184, 432 S.E.2d at 840; *See also R.A.V.*, 505 U.S. 382, 383, 384. Where speech is

⁶ Typically, the second determination involves the location of the speech at issue. In the case of AA, speech causing lost love and affection can occur in any forum, but for the purposes of this opinion, it is safe to assume that the speech referenced by AA occurs in private areas, such as the home or bedroom. The analysis may shift depending upon the forum or method utilized in rendering the speech. Moreover, even if the speech were to occur in a restaurant or on a street, it is safe to assume that the speech at issue remained between persons consensually involved in the conversation, and not publicly announced. Thus, for the purposes of this opinion, a forum analysis need not be addressed.

the cause for the AA claim, that speech should fall within the First Amendment's protection unless it is defamatory or false speech.⁷

Here, no compelling state interest exists in protecting the marital relationship that can justify AA's suppression of a right as fundamental as free speech. Moreover, assuming that a compelling state interest might exist, AA's practical effect is to chill speech by not setting clear limits on what speech is actionable and what is protected; therefore, AA violates the First Amendment's guarantee of free speech because it would also fail to satisfy the narrowly tailored requirement under strict scrutiny.

B. North Carolina's constraint of the private consensual behavior required to sustain Criminal Conversation or Alienation of Affection⁸ common law causes of action violates the First Amendment protection of expressive conduct as incorporated through the Fourteenth Amendment's Due Process Clause.

Although the First Amendment's text only explicitly forbids abridgment of speech, the U.S. Supreme Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). The U.S. Supreme Court "acknowledge[s] that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id.* Whether conduct falls within the First Amendment's purview of protection, the following analysis must be conducted to determine: (1) whether "an intent to convey a particularized message was present"; and (2) "whether the likelihood was great that the message would be understood by those who viewed it." *Id.* When individuals engage in consensual sexual intercourse, the general message conveyed is the desire to be intimate with or display affection for one another. Moreover, when individuals engage in consensual sexual intercourse, a great likelihood exists that a reasonable person, when considering the conduct, would observe a "message" of affection or intimacy.

If an act constitutes expressive conduct, then under First Amendment's guarantee of protection, the government cannot justify impinging that protection unless the government's

⁷ However, in a scenario where the defendant's speech that caused lost love and affection between the plaintiff and plaintiff's spouse, it is unprotected because it constitutes defamatory speech. The plaintiff can theoretically sue to obtain damages by bringing a claim for defamation, which is the proper remedy in such a scenario, and not AA.

⁸ While sexual intercourse is a required element of proof in CC, it is not necessarily present in the context of AA cases; however, in this case, Plaintiff has alleged that the consensual sexual relationship between Defendant and Plaintiff's husband caused Plaintiff to lose her husband's love and affection for her.

regulation is unrelated to the suppression of free expression. *Id.* at 403. As laid out in *Texas v. Johnson*, if the government's regulation is unrelated to expression, then the less stringent *O'Brien* test for regulating noncommunicative conduct applies. *Id.* However, if related to suppressing free expression, then the government must show that the regulation furthers an important or substantial governmental interest with the incidental restriction on the protected First Amendment conduct being no greater than is essential in furthering that governmental interest. *Id.*

i. Alienation of Affection claims violate the First Amendment's free expression guarantee.

In the context of conduct prohibited by AA, that conduct is meant to convey a message of affection which is likely to be understood by those viewing the conduct, be it giving advice, discussing social, political or marital aspects of personal relationships, or engaging in consensual sexual intercourse. Whatever the situation may be, AA explicitly seeks to punish the expression of friendliness, affection, or intimacy by consenting parties and effectively restrains those consenting parties from engaging in free expression. By virtue of AA's suppression of messages conveyed by consenting parties, the government is required to prove that AA furthers an important or substantial governmental interest, with the incidental restriction of an individual's protected First Amendment rights being no greater than is essential in furthering that governmental interest.

Pertaining to the government's interest in this area, in *State v. Whiteley*, the N.C. Court of Appeals held that "regulation of particular sexual acts is permissible when legitimate state interests justify intrusion into the personal and private life of the individual, but is not permissible when such regulation intrudes upon personal relations with no legitimate state interest." *State v. Whiteley*, 172 N.C. App. 772, 778, 616 S.E.2d 576, 580 (2005). *Whiteley's* holding set forth an enumerated list of legitimate state interests including sexual "conduct involving minors, non-consensual and coercive conduct, public conduct, and prostitution." *Id.*, at 779, 616 S.E.2d at 580, 581. The sexual conduct referenced in the instant opinion is limited to sexual conduct involving consenting adults in constitutionally protected areas such as the bedroom; therefore, no substantial, important, or even legitimate state interest exists because the

enumerated list in *Whiteley* does not include the consensual sexual conduct referenced in AA cases.

For the foregoing reasons, AA unconstitutionally encroaches upon one's right to express himself or herself as guaranteed by the First Amendment's protection of expressive conduct. Consensual sexual intercourse expresses a message of affection or intimacy between those involved. An AA cause of action seeks to suppress that message of intimacy or affection, and the state has no substantial, important, or even legitimate interest in regulating consensual sexual intercourse occurring in private. Additionally, AA's restriction cannot further a governmental interest if no such interest exists. Moreover, assuming *arguendo* that the state has an interest in discouraging consensual sexual conduct, AA's prohibition extends far greater than is essential to further the state's interests in the context of sexual acts enumerated in *Whiteley*. *Id.*

ii. Criminal Conversation claims violate the First Amendment's free expression guarantee.

Sustaining a cause of action for CC requires the plaintiff to prove the existence of an "actual marriage between the spouses and sexual intercourse between defendant and plaintiff's spouse during the coverture." *Kluttz*, 6 N.C. App. at 209, 170 S.E.2d at 109. Regarding expressive conduct, CC punishes all expression of affection or intimacy in the form of consensual sexual conduct between individuals if adultery directly results from the sexual intercourse. As previously stated, adults involved in consensual sexual intercourse intend to convey a message of intimacy and a great likelihood exists that observers of the conduct would understand the conduct's intended message of intimacy.

The next analytical step is to determine whether North Carolina's interest in CC's inherent punishment relates to suppressing the free expression of intimacy by adults involved in consensual sexual intercourse. As stated before, in the context of North Carolina's interest involving sexual acts, *Whiteley* held "regulation of particular sexual acts is permissible when legitimate state interests justify intrusion into the personal and private life of the individual, but is not permissible when such regulation intrudes upon personal relations with no legitimate state interest." *Whiteley*, 172 N.C. App. at 778, 616 S.E.2d at 580. *Whiteley*'s holding, however, limited the state's legitimate interests in regulating sexual acts to sexual "conduct involving minors, non-consensual and coercive conduct, public conduct, and prostitution." *Id.*, at 779, 616

S.E.2d at 580, 581. The sexual conduct referenced in this Court's opinion is limited to consensual sexual conduct in constitutionally protected areas such as the home; therefore, no substantial, important, or even legitimate state interest exists because the enumerated list in *Whiteley* does not include the consensual sexual conduct referenced in CC cases.

For the foregoing reasons, CC unconstitutionally infringes one's right to express oneself as guaranteed by the First Amendment's protection of expressive conduct. No substantial, important, or even legitimate state interest exists for punishing affection or intimacy expressed through consensual sexual conduct that takes place in private; CC's restriction cannot further a state interest if no such interest exists. Therefore, CC unconstitutionally infringes upon an individual's protected First Amendment right of expressive conduct to engage in consensual sexual intercourse. Moreover, regardless of whether CC's punishment relates to suppressing free expression, no legitimate state interest exists, as set forth in *Whiteley. Id.* To otherwise uphold CC's suppression of an individual's expressive conduct as "no greater than is essential to the furtherance of [a state] interest" when no state interest actually exists would be an absurdity. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Furthermore, assuming *arguendo* that the state has a legitimate interest in punishing consensual sexual conduct, the consequences of the cause of action extend far greater than is necessary to further the state's interests in the context of sexual acts enumerated in *Whiteley. Whiteley*, 172 N.C. App. at 779, 616 S.E.2d at 580, 581.

C. North Carolina's suppression of the intimate associations required to sustain Alienation of Affection and Criminal Conversation claims for relief violate the First Amendment guarantee of free association as incorporated through the Fourteenth Amendment's Due Process Clause.

The U.S. Supreme Court "has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments." *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 543 (1963) (citations omitted). The First Amendment additionally precludes state imposition of liability upon an individual solely because of an association with another. *N.A.A.C.P. v. Clairborne Hardware Co.*, 458 U.S. 886, 918, 919 (1982). Freedom of association is categorized into two distinctions: freedom of intimate association and freedom of expressive association. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617, 618 (1984). First is the choice "to enter into and maintain certain intimate human relationships [which] must be secured against undue intrusion by the State because of the

role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” *Id.* “In this respect, freedom of association receives protection as a *fundamental element of personal liberty.*” *Id.* (emphasis added). Second is the U.S. Supreme Court’s recognition of a “right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” *Id.* “The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.” *Id.*

Clearly, AA and CC violate the first category by potentially chilling the freedom of intimate association. In *Roberts v. U.S. Jaycees*, the U.S. Supreme Court recognized the choice “to enter into and maintain certain intimate human relationships [which] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme” to be fundamental. *Id.* The Court steadfastly held that where a liberty is fundamental the state is required to pass a strict scrutiny analysis. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). “[T]he Fourteenth Amendment ‘forbids the government to infringe ... “fundamental” liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” *Id.* “[A] ‘governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’” *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). AA and CC’s proscription are therefore violative of the First Amendment’s guarantee of free association because, as shown above, with the state lacking a compelling interest, both fail in the face of a strict scrutiny analysis.

III. Enforcement of Alienation of Affection and Criminal Conversation common law causes of action by North Carolina courts violates the Fourteenth Amendment’s Substantive Due Process Clause by encroaching upon individuals’ fundamental right to consensual private conduct.

The Fourteenth Amendment’s Due Process Clause provides that “no State shall deprive any person of life, liberty, or property, without due process of law.” U.S. Const Amend. XIV, § 1. Ingrained in the U.S. Supreme Court’s substantive due process tradition is acknowledgment that personal decisions relating to the rights and liberties of marriage and family relationships involve the most intimate and personal choices individuals may make in their lives. *Glucksberg*,

521 U.S. at 726. Specifically, “[o]ur cases recognize ‘the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.’” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (emphasis added). The U.S. Supreme Court recognized in *Griswold v. Connecticut* “that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” *Griswold*, 381 U.S. at 483. In *Griswold*, the U.S. Supreme Court specially acknowledged that “zones of privacy” derive from various guarantees within the Bill of Rights. *Id.* at 484.

Moreover, “[i]t is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other.” *Casey*, 505 U.S. at 851. “That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty.” *Id.* “Thus, while some people might disagree about whether or not the [American] flag should be saluted, or disagree about the proposition that it may not be defiled, [the U.S. Supreme Court has] ruled that a State may not compel or enforce one view or the other.” *Id.* U.S. Supreme Court precedent has remained steadfast to the fundamental premise that family life is a private realm that the state cannot enter. *Id.*

Well-settled substantive due process analysis involves two features. First, the Due Process Clause protects “fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” Second, substantive due process requires “a ‘careful description’ of the asserted fundamental liberty interest.” *Glucksberg*, 521 U.S. at 720, 721. In conducting a substantive due process analysis, “[o]ur Nation’s history, legal traditions, and practices [serve as] crucial ‘guideposts for responsible decisionmaking,’ that direct and restrain our exposition of the Due Process Clause.” *Id.* at 721. The U.S. Supreme Court acknowledges, however, that although “[h]istory and tradition are the starting point”, they are “not in all cases the ending point[.]” *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

By delving into the history and tradition of AA and CC, one can objectively deduce the liberty interest at stake in order to determine whether that liberty is fundamental. Historically, both AA and CC served as a cuckolded husband’s means of remedy when his wife was enticed

by another. The gravamen of AA is grounded in remedying “the deprivation of the plaintiff of his conjugal rights to the society, affection, and assistance of his wife[.]” *Chestnut v. Sutton*, 207 N.C. 256, 176 S.E. 743, 734 (1934). Although a different cause of action, CC enjoys a similar purpose as a remedy for “the defilement of plaintiff’s wife by the defendant.”⁹ *Id.* Therefore, the liberty at stake in AA and CC includes the engagement of private sexual intercourse between consenting adults as well as, in the AA context, consenting adults engaging in private communication.

Following the careful description of an asserted right, the next inquiry is whether that right is fundamental. *Lawrence v. Texas* controls here.¹⁰ In *Lawrence*, the U.S. Supreme Court held the individual litigant’s liberty interest to be fundamental by striking down a state statute that criminalized two people of the same sex engaging in certain intimate sexual conduct. In reaching that decision, the U.S. Supreme Court considered the abolishment of similar sodomy statutes in a majority of states over the last half a century. *Lawrence*, 539 U.S. at 572, 573. The U.S. Supreme Court affirms that the U.S. Constitution’s protection envelops an individual’s “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” *Id.* at 574. Moreover, the U.S. Supreme Court further held that those “matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” *Id.*

The *Lawrence* Court, in overruling the *Bowers v. Hardwick* precedent which previously upheld state sodomy statutes, relied upon Justice Stevens’ dissenting opinion, which stated:

⁹ Historically, CC acted as remedy to a cuckolded husband’s injury “sustain[ed] by the dishonor of his marriage bed, the alienation of his wife’s affections, the destruction of his domestic comfort, the suspicion cast upon the legitimacy of her offspring, the loss of consortium, or the right to conjugal fellowship of his wife, to her company, co-operation, and aid in every conjugal relation, the invasion and deprivation of his exclusive marital rights and privileges, his mental suffering, injured feelings, humiliation, shame, and mortification, caused by the loss of her affections and the disgrace which the tortious acts of defendant have brought or heaped upon him, and which are proximately caused by said wrong.” *Powell v. Strickland*, 163 N.C. 393, 393, 79 S.E. 872, 876 (1913).

¹⁰ Although *Lawrence* dealt with a criminal matter as opposed to civil, and the N.C. Supreme Court considers punitive damages comparable to legal punishment and akin to criminal matters. *See, e.g., Allred v Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964); *See also Stone v. Martin*, 56 N.C. App. 473, 289 S.E.2d 898 (1982) (holding that the North Carolina Constitution extends the privilege against compulsory self-incrimination to civil matters involving punitive damages due to their penal nature).

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

Id. at 577, 578 (holding that Justice Stevens’ analysis controlled in *Lawrence*). Therefore, although history and tradition are a starting point, prohibitions stemming from common law and traditionally enforced by state action can still violate an individual liberty protected by the Fourteenth Amendment’s Substantive Due Process Clause. *Mims v. Mims*, 305 N.C. 41, 55, 286 S.E.2d 779, 788 (1982) (holding that judicially created common law can be altered when deemed necessary in light of experience and reason). Moreover, the U.S. Supreme Court affirms that “[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law[.]” *McRae*, 448 U.S. at 315. AA and CC merely serve as a way to allow certain citizens in North Carolina to use the state courts to impose punishment by enforcement of the statutory provisions under the punitive damages statutes, and, by its effect, to legislate morality.

Similar to the sodomy statute in *Lawrence*, all but six states have abolished AA and CC,¹¹ with the consensus that these “heart balm” torts represent an antiquated and no longer useful means of protecting marriage.¹² In fact, disgruntled ex-spouses typically utilize AA and CC as blackmail to obtain more money from an ex-spouse or an ex-spouse’s paramour; they seldom, if ever, serve as a means for reconciliation of the broken marriage. Therefore, an adult individual’s right to engage in private consensual sexual intercourse involving another consenting adult or to engage in private consensual communication with another adult constitutes a fundamental liberty that is deeply-rooted in our Nation’s history.¹³ *Lawrence*, 539 U.S. at 574.

¹¹ Defendant’s Counsel, with no objection from Plaintiff’s Counsel, provided these statistics to the Court during the hearing in the week of April 7, 2014.

¹² McDougal, *Legislating Morality: The Actions for Alienation of Affections and Criminal Conversation in North Carolina*, 33 Wake Forest L. Rev. 163, 172-176 (Spring 1998).

¹³ Alternatively, if consensual sexual intercourse and private speech in the context of AA and CC were not fundamental liberties, then AA and CC would be subject to a rational basis analysis rather than strict scrutiny.

“[T]he Fourteenth Amendment ‘forbids the government to infringe ... “fundamental” liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” *Glucksberg*, 521 U.S. at 721. “[A] ‘governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’” *Griswold*, 381 U.S. at 485.

Accordingly, AA and CC’s constitutionality depend upon whether they can survive strict scrutiny, which, as shown earlier in this opinion, they cannot: no compelling state interest exists in punishing consensual sexual intercourse or private speech. Although AA and CC carried over from common law tradition, they violate substantive due process because they no longer fulfill their traditional purpose. Moreover, all but six states have abolished both causes of action, and, according to the U.S. Supreme Court, private consensual conduct involving two consenting adults constitutes a fundamental liberty. Therefore, AA and CC are unconstitutional violations of the First Amendment’s guarantee of free speech, the First Amendment’s guarantee of free expression, the First Amendment’s guarantee of free association, and the Fourteenth Amendment’s substantive due process protection of private conduct involving consenting adults, because each claim for relief fails in the face of a strict scrutiny analysis.

Conclusion

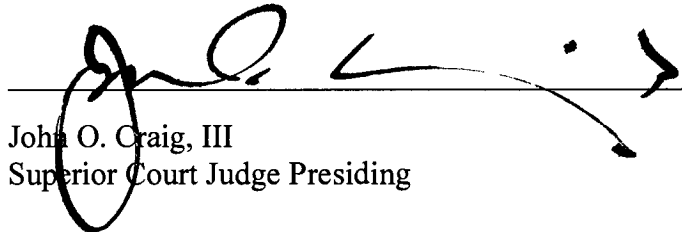
For the foregoing reasons, Defendant’s motion to dismiss the criminal conversation and alienation of affection claims for relief filed against her and to invalidate the common law torts of criminal conversation and alienation of affection pursuant to Rule 12(b)(1) and 12(b)(6) must be allowed because they violate the First and Fourteenth Amendments of the U.S. Constitution.

Glucksberg, 521 U.S. at 728. If subjected to a rational basis test, however, AA and CC still fail because, as shown earlier in this opinion, no legitimate state interest exists in punishing the sort of conduct required for sustaining either action. Therefore, AA and CC fail to survive a rational basis analysis.

NOW, THEREFORE, based on the foregoing, it hereby is ORDERED that:

Defendant's motion to dismiss is GRANTED.

This the 11th day of June, 2014.



John O. Craig, III
Superior Court Judge Presiding