

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1475

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

TERRY EUGENE HARRIS,
Plaintiff

v.

Haywood County
No. 00 CVS 1203

MICKEY C. STAMEY,
Defendant

Appeal by defendant from judgment entered 10 August 2001 by Judge Thomas W. Seay, Jr. in Haywood County Superior Court. Heard in the Court of Appeals 15 July 2002.

Brown Queen Patten & Jenkins, P.A., by Frank G. Queen and Donald N. Patten, for plaintiff-appellee.

Hylar & Lopez, P.A., by George B. Hylar, Jr. and Robert J. Lopez, for defendant-appellant.

WALKER, Judge.

On 3 November 2000, plaintiff filed a complaint against defendant alleging alienation of affections and criminal conversation, in which he sought compensatory and punitive damages. Defendant denied the allegations in an answer filed on 3 January 2001. Plaintiff filed a motion for summary judgment on his criminal conversation claim, in support of which he attached an affidavit and defendant's answers to interrogatories. In the affidavit, dated 4 May 2001, plaintiff stated he "is married to

Marcia Parris Harris and was married on or about the 3rd day of June, 1989." Defendant indicated in his answers to interrogatories that he had "sex[ual] intercourse or other sexual relations" with Marcia Harris for the first time on 27 September 2000. Defendant subsequently filed a motion to dismiss and a motion *in limine*.

On 16 July 2001, the trial court heard the parties' motions. The trial court took judicial notice that plaintiff and Marcia Parris Harris separated on 16 September 2000. In a judgment entered 10 August 2001, the trial court found "there [was] no genuine issue as to any material fact as to Plaintiff's asserted claims for Criminal Conversation and that summary judgment should be allowed as a matter of law as to those claims." The trial court then entered summary judgment for plaintiff's claim for criminal conversation and denied defendant's motion to dismiss. From the trial court's judgment, defendant appeals.

We note this appeal is interlocutory and subject to dismissal. See *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 433 (1980). Nevertheless, in the exercise of the discretion granted us by N.C.R. App. P. 21, we treat the appeal as a petition for writ of certiorari, issue the writ, and proceed to consider the appeal. Defendant contends the trial court erred in granting plaintiff's motion for summary judgment as to the claim for criminal conversation. He argues a claim for criminal conversation cannot be maintained when all of the evidence establishes that the acts of sexual intercourse between him and plaintiff's spouse occurred

after the date of separation of plaintiff and his spouse. We disagree.

"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." *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996). Here, the evidence before the trial court shows that plaintiff married Marcia Parris Harris on 3 June 1989, that they separated on 16 September 2000, and that they were still married on 4 May 2001. In his answers to interrogatories, defendant admitted having had sexual intercourse or other sexual relations with Marcia Harris for the first time on 27 September 2000.

Although defendant's conduct occurred after plaintiff's separation from his spouse, this Court has held "that post-separation conduct is sufficient to establish a claim for criminal conversation." *Johnson v. Pearce*, 148 N.C. App. 199, 201, 557 S.E.2d 189, 191 (2001). Because the facts establishing defendant's criminal conversation are undisputed, the trial court did not err by granting plaintiff's motion for summary judgment as to that claim. See N.C.R. Civ. P. 56(c). As a result of the preceding analysis, we find defendant's second argument--that the trial court erred by not dismissing the claim for criminal conversation--is without merit.

Affirmed.

Judges THOMAS and BIGGS concur.

Report per Rule 30(e).