

Court of Appeals holds that “heart balm” claims are not facially unconstitutional

North Carolina is among only a handful of states still recognizing the civil claims of alienation of affection and criminal conversation. Known as the twin “heart balm” torts, these laws were devised long ago when women were regarded as a type of property and private morals were regular court business. In short, these claims allow a person to sue his or her spouse’s paramour for money damages. To prove “alienation of affection,” a plaintiff must show that the defendant wrongfully alienated and destroyed the genuine love and affection that existed between plaintiff and spouse. (Although lovers typically are the target of these suits, a defendant could be another third person who has set out to create the rift.) To prove criminal conversation, a plaintiff must show that the defendant had sexual intercourse with the plaintiff’s spouse in North Carolina during the marriage (but before separation).

In the other states that have not yet swept them into the dustbin of history, these claims do not often make their way to court. North Carolina appears to be one of only a couple of states in which they are filed regularly and sometimes result in substantial settlements and large verdicts.

But even in North Carolina the continued enforcement of these claims has long been controversial. Over two decades ago a well-known tort treatise declared their legitimacy “problematic” and “dubious.” See Logan and Logan, *North Carolina Torts*, Ed. 1996, p. 439. A decade before that, in 1984, the North Carolina Court of Appeals attempted to judicially abolish them, stating that “there is no continuing legal basis for the retention of these tort actions today” and that they “remain permeated with the uncultivated and obsolete ideas which marked their origin.” *Cannon v. Miller*, 71 N.C. App. 460, 497 (1984). The court’s attempt was, however, rebuffed by the North Carolina Supreme Court without discussion of the merits. 313 N.C. 324 (1985).

In more recent times defendants have challenged these claims on constitutional grounds. In 2014, this effort succeeded at the trial court level in *Rothrock v. Cooke* (see the court’s order [here](#)), but the case was not appealed. Then last year the Forsyth County case of *Malecek v. Williams* was also dismissed as unconstitutional. Yesterday the North Carolina Court of Appeals issued an [opinion](#) reversing that decision.

[Malecek v. Williams](#)

In 2015, Amber Malecek, a nurse, began a sexual relationship with Dr. Derek Williams. Marc Malecek, Amber’s husband, sued Dr. Williams under both tort theories. Dr. Williams moved to dismiss both claims on grounds that they were facial violations of his First and Fourteenth Amendment rights. The trial court agreed and in May 2016 dismissed the case at the pleadings stage. Mr. Malecek appealed the dismissal, and the Court of Appeals disagreed with the trial court.

The Court of Appeals acknowledged from the outset that “these laws were born out of misogyny and in modern times are often used as tools for enterprising divorce lawyers seeking leverage over the other side.” [For a candid admission of this strategy, see [here](#).] The panel went on to make clear that its opinion was “neither an endorsement nor a critique” of the claims, and stated that “[w]hether this Court believes these torts are good or bad policy is irrelevant; we cannot hold a law facially unconstitutional because it is bad policy.”

Substantive Due Process

The court agreed that the United States Supreme Court in [Lawrence v. Texas](#) reaffirmed an adult's constitutionally protected interest in “engaging in sexual activity free of governmental intrusion or regulation.” The court further agreed that tort claims based on his sexual activity with Ms. Malecek implicate Dr. Williams's Fourteenth Amendment rights. The court noted, however, that *Lawrence* held that regulation of private consensual sexual activity is prohibited “*absent injury to a person or abuse of an institution the law protects.*” (emphasis added). The court then declared that marriage is one such protected institution, and that a marital promise of fidelity, once broken, results in injury to the other spouse. Applying a “robust rational basis” review, the court then concluded that North Carolina's need to protect these interests justifies a private tort action that restricts protected sexual activity: “[T]hese torts deter conduct that causes personal injury; they protect promises made during the marriage; and they help preserve the institution of marriage, which provides innumerable benefits to our society.” Because Dr. Williams had not shown that the torts “stem from lingering prejudice or moral disapproval that overshadows the State's other reasons for enacting them,” he had not demonstrated that they facially violate the Fourteenth Amendment.

Freedom of Speech, Expression, and Association

The Court of Appeals agreed with Dr. Williams that liability for sexual activity implicates his First Amendment right to free expression. Applying the test established in [United States v. O'Brien](#), however, the court held that the government's interest in regulating the expression was not based on its *content*, but instead on deterring the “harmful effects *that result*” from it. The court concluded that because these torts have a deterrent effect that benefits the State and society, they are “narrow enough to survive scrutiny under the *O'Brien* test.” The court also rejected the argument that the torts burden his First Amendment right to free association. Noting that there are many other ways to associate with a married person without incurring tort liability, the court concluded that “the incidental burden on those rights does not render these torts facially unconstitutional.”

Looking Ahead

Whether Dr. Williams will seek additional review by our Supreme Court remains to be seen. In the meantime, the heart balm torts have survived to see another day...at least to a point. The court in

Malecek closed with a reminder about the limits of its opinion:

"We emphasize that our holding today does not mean that every application of these common law torts is constitutional. There may be situations where an as-applied challenge to these laws could succeed. Take, for example, one who counsels a close friend to abandon a marriage with an abusive spouse. But this case, as the parties concede, is not one of those cases. It was decided as a facial challenge on a motion to dismiss at the pleadings stage. In the future, courts will need to grapple with the reality that these common law torts burden constitutional rights and likely have unconstitutional applications. For now, we hold only that alienation of affection and criminal conversation are not facially invalid under the First and Fourteenth Amendments."